TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 135.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, AND STERRETT TATE, PETITIONERS,

vs.

DAVID J. WINN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED JANUARY 12, 1916.
CERTIORARI AND RETURN FILED FEBRUARY 9, 1916.

(21,479.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 24, 1910.

a *Transcript of Record.*

United States Circuit Court of Appeals for the Second Circuit.

JOSEPH N. CARPENTER et al., Plaintiffs in Error (Defendants Below),
vs.
DAVID J. WINN, Defendant in Error (Plaintiff Below).

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the Direction of the Clerk.

[Stamped:] United States Circuit Court of Appeals, Second Circuit. Filed Jan. 23, 1908. William Parkin, Clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between David J. Winn, plaintiff, and Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, defendants, a manifest error hath happened, to the great damage of the said Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate as is said and appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 12th day of November, 1907, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second
2 Circuit may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of October, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

[L. S.] JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

GEO. C. HOLT,
U. S. District Judge, Holding C't Court.

(Endorsed:) Copy received Oct. 17, 1907.—Boothby & Baldwin, Att'ys for Def't in Error.—Filed Oct. 17, 1907.—John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from 3 to 87, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and
3 Sterrett Tate, Plaintiffs-in-Error, against David J. Winn, Defendant-in-Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 19th day of December, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Petition.

Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, defendants in the above-entitled cause, feeling themselves aggrieved by the order entered herein on the 25th day of June, 1907, long before the time when said cause could be reached on the calendar for trial, the order entered herein on the 31st day of July, 1907, long before the time when said cause could be reached on the calendar for trial, and the judgment entered herein on the 18th day of September, 1907, in pursuance of
4 said orders directing the entry thereof, long before the time when the said cause could be reached on the calendar for trial, come now by John R. Abney, their attorney, and petition said court for an order allowing said defendants to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the

Second Circuit to review the said orders and judgment, under and according to the laws of the United States in that behalf made and provided.

And your petitioners will ever pray.

JOHN R. ABNEY,
Attorney for Defendants.

(Endorsed:) Filed Oct. 16, 1907.—John A. Shields, Clerk.

5 At a Stated Term of the United States Circuit Court for the Southern District of New York, held in the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of October, 1907.

Present: Hon. George C. Holt, Circuit Judge.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Order Allowing Writ of Error.

Upon motion of John R. Abney, Esq., attorney for defendants, and upon filing a petition for a writ of error and assignment of errors, it is

Ordered, that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit, an order heretofore entered herein on June 25th, 1907, an order heretofore entered herein on July 31st, 1907, and the judgment heretofore entered herein on September 18th, 1907, in pursuance of said orders directing the entry of said judgment, and that a transcript of the record herein, consisting of said order of June 25th, 1907, the plaintiff's papers in the motion, and the defendants' affidavit and their memorandum, which contains their objections to the jurisdiction, power and discretion of the Court to grant said motion, the order of July 31st, 1907, the plaintiff's
6 papers in the motion, and defendants' affidavit in opposition to the granting of said motion, and the judgment entered on September 18th, 1907, and all proceedings in the case.

GEO. C. HOLT,
District Judge, Sitting as Circuit Judge.

(Endorsed:) Filed Oct. 16, 1907.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of
7 New York, this 29th day of January, in the year one thousand nine hundred and seven.

JOHN A. SHIELDS, *Clerk.*

BOOTHBY & BALDWIN,
Plaintiff's Attorneys,
Office and Post Office Address, 31 *Nassau Street,*
Borough of Manhattan, New York City.

(Endorsed:) Filed Aug. 1, 1907.—John A. Shields, Clerk.

United States Circuit Court for the Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

The plaintiff above named complains of the defendants by Boothby & Baldwin, his attorneys, and alleges and avers:

First. That the plaintiff is, and has been for a considerable period of time, engaged in the spinning and manufacture of cotton yarn, at Sumter, South Carolina, and is a citizen and resident of said State.

8 Second. Upon information and belief, that at all the times hereinbefore mentioned, the above-named defendants were copartners doing business under the firm name of Carpenter, Baggot & Company in the City of New York, and as such carried on the business of cotton brokers on the New York Cotton Exchange in said city, of which said partnership Joseph N. Carpenter and Nathaniel L. Carpenter were members, respectively, of the said New York Cotton Exchange, in the said City of New York.

Third. Upon information and belief, that the defendant Joseph N. Carpenter was and is a resident and citizen of Natchez, Missis-

sippi, and the defendants Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate were and are citizens and residents of the State of New York.

Fourth. Upon information and belief, that heretofore, to wit, on about the 4th day of September, 1906, the plaintiff employed the said defendants, as such brokers, to make and enter into, in their own name, but in his behalf, and for his account, contracts upon the floor of the said New York Cotton Exchange with other members of said Exchange, for the purpose and delivery on one hundred bales of cotton at the market price, to be delivered in the following November, and one hundred bales of cotton, at the market price, to be delivered in the following December, each bale of cotton to be of five hundred pounds in weight, and to replace such contracts as often as the same should be cancelled under the by-laws and rules of said Exchange, or otherwise, and to hold, carry and maintain such contracts for account of the plaintiff until the said cotton should be delivered, or until the plaintiff should order and direct the same to be closed out by sale or otherwise, all of
9 which defendants for valuable consideration agreed to do.

Fifth. Upon information and belief, that as soon as the plaintiff had given said order to the said defendants to enter into said contracts for his account, and upon his behalf, as aforesaid, he duly caused to be sent to the defendants his check for two hundred dollars, payable at the Farmers' Bank and Trust Company, at Sumter, South Carolina, as security for the carrying out, by the plaintiff, of said contract on his part, and for margins upon said contract, which was at the rate of one dollar per bale; which said check was duly received by the defendants, cashed by them, and placed to the account of the plaintiff, and the plaintiff was at all times able, ready and willing to put up, with the defendants, such other proper margin and security on said contracts as should be required by said defendants.

Sixth. Upon information and belief, that in pursuance of said employment, the said defendants, for and in behalf of the plaintiff, and at his request, as aforesaid, entered into contracts upon the floor of the said Cotton Exchange, pursuant to its by-laws, rules and regulations, in their own name, with other members thereof, for the purchase and delivery of one hundred bales of cotton to be delivered in November, 1906, and agreed to pay for the same 9 and 14/100 cents per pound, and one hundred bales of cotton, to be delivered as aforesaid, in December, 1906, and agreed to pay for the same 9 and 27/100 cents per pound, and notified the plaintiff thereof.

Seventh. Upon information and belief, that on or about the 3d day of October, 1906, the said defendants, without having called upon the plaintiff for any additional margins, or security,
10 and without notice to the plaintiff, and without his being in default in any way, and without his knowledge and consent, unlawfully, illegally, and arbitrarily closed out, cancelled and terminated the said contracts, by reason of which the plaintiff has been damaged in the sum of two thousand and seventy-five dollars;

and defendants have not returned, nor offered to return the said two hundred dollars, deposited by plaintiff with them, as aforesaid, as security and margin, although return thereof has been duly demanded, by which he has been damaged to the extent of two hundred dollars.

Wherefore, plaintiff demands judgment against the defendants in the sum of two thousand two hundred and sev-nty-five dollars, with interest thereon from the 3d day of October, 1906, with the costs of this action.

BOOTHBY & BALDWIN,
Attorneys for Plaintiff, No. 31 Nassau Street,
Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Ernest E. Baldwin, being duly sworn, deposes and says: That he is a member of the firm of Boothby & Baldwin, the attorneys for the plaintiff in the above-entitled action; that the allegations contained in the foregoing complaint are true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes the same to be true. That the reason why this complaint is not verified by the plaintiff is that he is a non-resident of and absent from the State of New York, and that the sources of deponent's information and the grounds of his belief are from statements made to him by the plaintiff, and
11 from having in his possession letters, statements and documentary evidence furnished to him by the plaintiff, and from other sources.

(Signed) ERNEST E. BALDWIN.

Sworn to before me this 29th day of January, 1907.
LAMAR HARDY,
Notary Public, N. Y. Co.

(Endorsed:) Filed Aug. 1, 1907.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

SIR: Please take notice that upon the pleadings herein and the answering affidavit of Ern-st E. Baldwin, verified the 6th day of May, 1907, and upon all other papers and proceedings herein, *as* shall move this Court, at a Term thereof for the hearing of motions, to be held in the United States Post Office and Court House Building, in the Borough of Manhattan, City of New York, on the 10th day of May, 1907, at the opening of Court, or as soon thereafter as counsel may be heard, for an order directing that the defendants

produce, before the trial of this action, at such time and
12 place as the Court may designate, all their books, papers, writings, accounts books, day books, blotters, journals, registers, cash books, bill books, letter books, sales books, check books, contracts, contract slips and memoranda made or received by them, their agents and employees, which contain any memoranda of any business transactions had for and in behalf of or relating to the plaintiff herein, for the years 1905 and 1906, and more particularly of the purchase and sale of two hundred (200) bales of cotton, one hundred (100) deliverable in November, 1906, and one hundred (100) deliverable in December, 1906, or which relate *to* any way to the purchase and sale of said cotton, whether alleged to have been made for the account of the plaintiff herein, or P. G. Bowman, of Sumter, South Carolina, or for the Sumter Banking and Mercantile Company, or any part of any such books, documents and writings, which in any way refer to or contain entries of, or mention the two hundred bales of cotton set forth and described in the complaint herein; and permit the plaintiff, his attorneys and agents, at said time and place, to investigate, copy and make abstracts of such documents, books and writings, and directing that the defendant-, upon failure to comply with said order, shall suffer judgment against *him,* as in cases of nonsuit, and for such other and further relief as to the Court may seem just and proper.

Dated New York, May 6th, 1907.

Yours, etc.,

BOOTHBY & BALDWIN,
Attorneys for Plaintiff, No. 31 *Nassau Street, Borough of Manhattan, City of New York.*

To John R. Abney, Esq., 27 William Street, Borough of Manhattan, City of New York.

13 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

COUNTY OF NEW YORK, *ss:*

Ernest E. Baldwin, being duly sworn, says: That he is a member of the firm of Boothby & Baldwin, the attorneys for the plaintiff in the above-entitled action, and is familiar with all the papers and proceedings therein.

That this is an action at law which was brought by the plaintiff, who is a spinner of cotton at Sumter, South Carolina, against the defendants to recover damages on account of breach of contract, as appears from the pleadings herein, and was commenced by the service of a summons and complaint on the 30th day of January,

1907, and is now at issue, the answer having been served on the 27th day of March, 1907.

The facts upon which the action is based are, shortly, as follows: Plaintiff employed the defendants, who were cotton brokers in the City of New York, on or about the 4th day of September, 1906, to make and enter into, in their own names, but in his behalf, and for his account, contracts on the New York Cotton Exchange,
14 with other members thereof, for the purchase and delivery of one hundred bales of cotton at the market price, to be delivered the following November, and one hundred bales of cotton, at the market price, to be delivered the following December, and to replace the same as often as they should be cancelled under the by-laws and rules of said Exchange, or otherwise, and to hold and carry them for account of the plaintiff until the said cotton should be delivered, or until the plaintiff should order and direct them to be closed out by sale, or otherwise. Defendants, for a valuable consideration, agreed to do this, and in pursuance of said employment, on or about that day, entered into contracts for said amounts of cotton deliverable in said months, in their own names, but for and in behalf of the plaintiff, on said Exchange, at the price of 9 and 14/100 cents per pound for November cotton, and 9 and 27/100 cents per pound for December cotton, and notified plaintiff thereof. At the time of giving the said order to the defendants to enter into said contracts as aforesaid, plaintiff duly caused his check for $200, drawn upon the Farmers' Bank & Trust Co., of Sumter, South Carolina, to be sent to the defendants, as security and margins for said contract, which check the defendants cashed and placed to the *amount* of the plaintiff. Subseqently, and on or about the 3d day of October, 1906, the defendants, without calling upon the plaintiff for additional margins, or security, and without notice to the plaintiff, and without his being in default in any way, and without his knowledge and consent, unlawfully, illegally and arbitrarily closed out, cancelled and terminated the said contracts, to plaintiff's damage in the sum of two thousand and seventy-five dollars ($2,075). Defendants likewise have retained the said two hundred dollars deposited by plaintiff as aforesaid as security and margins, and
15 have not offered to return the same. Judgment is demanded for the sum of two thousand two hundred and seventy-five dollars, with interest from October 3, 1906.

For defence, the defendants aver that they were not employed by the plaintiff to enter into said contracts, but were employed by one P. G. Bowman, of Sumter, South Carolina, for whom they were buying and selling cotton upon said New York Cotton Exchange, and who had an arrangement with them for putting up margins to secure them for the continuance of said arrangement. That the bales of cotton set forth in the complaint, deliverable in November and December, were for the order of the said P. G. Bowman, pursuant to an agreement by which the said Bowman was to make good any margins upon call from the defendants, and that they called upon him for further margins on September 14, 19, and on September 26, 1906, which Bowman refused and omitted to for-

ward and put up, and consequently defendants notified him that unless he did put up further margins to carry out said contracts, that they would have to close the same, which they did on October 3, 1907. They admit in their answer that notice of the purchase of said cotton under said contracts may have been inadvertently made out and sent by their clerks to the plaintiff instead of to the said Bowman.

It is, therefore, apparent that the real point in issue is whether there was any contractual relation between the plaintiff and the defendants, and it is necessary and material to be proved as a fact in this action.

Deponent further says that he is in possession of purchase slips, purporting to have been made out by the defendants to the plaintiff, and forwarded to the plaintiff at his home, in Sumter, South Carolina, which indicate that defendants did enter into the con-
16 tracts for plaintiffs as heretofore described and deponent is likewise in possession of the check for two hundred dollars, for the margins before referred to, which *pro*ports to bear the signature of the defendants, and which was duly cashed.

The defendants have denied the employment, but have admitted that notice of the purchase of the said cotton might have been sent to plaintiff by mistake*n*, instead of the said Bowman.

Deponent avers that the books, documents and writings in the possession and control of the defendants contain evidence pertinent to the issues herein, and throw light upon the contested point: for whose account the said contracts were entered into and under what circumstances the notice was sent, to the plaintiff, of the making of said contracts, and to whom the proceeds of the two hundred dollar check *was* credited, and will likewise show when the said contracts were closed and terminated, at what price, and the amount realized.

Deponent further avers that it is necessary in the preparation of the case for trial, that the plaintiff and his attorneys should have the opportunity to make copies and transcripts of and from said books, documents and writings that pertain to said contracts and said check. That an inspection and perusal thereof at the trial only would be of little or no benefit to the plaintiff in the preparation of his case, inasmuch as an unfamiliarity with said books, and the method of keeping the same, to the plaintiff and his attorneys, would delay and hinder the orderly and speedy trial of the case.

Deponent further says that a more particular description of the said books, documents and writings cannot be given by plaintiff or his attorneys.

Deponent further says that the reason the affidavit of the plaintiff cannot be presented, is that he resides at Sumter, South Carolina, and all of the documents which were in his possession have
17 been and now are in the possession of deponent, with reference to the issues in this case. That no previous application for this order has been made.

(Signed) ERNEST E. BALDWIN.

Sworn to before me this 6th day of May, 1907.

(Signed) LAMAR HARDY,
Notary Public, N. Y. Co.

Complaint.

It is agreed that this is the same as the complaint above printed, verified the 29th day of January, 1907, and that therefore the copy of complaint need not be printed here.

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Answer.

The defendants above named, answering the complaint herein by John R. Abney, their attorney, for answer thereto say:

18 I.—For a First Defense.

1. They deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "First" of the complaint.

2. Upon information and belief, they deny each and every allegation contained in all the other paragraphs of the complaint, except as follows: They admit that all of them except Sterrett Tate were copartners doing business as cotton brokers on the New York Cotton Exchange, in said city, of which said partnership said Joseph N. Carpenter and Nathaniel L. Carpenter were members, respectively, of the said Cotton Exchange of the City of New York, and said Sterrett Tate became a member of said firm on the 1st day of October, 1906, and continued to be a partner thereafter; they admit that Joseph N. Carpenter was and is a resident of Natchez, Mississippi, and the defendants Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate were and are residents of the State of New York; they deny any knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff was at all times able, ready and willing to put up, with the defendants, such proper margin and security on contracts mentioned in the complaint, as should be required by the defendants; they admit that a notice of purchase may have been inadvertently made out and sent by one of their clerks to plaintiff instead of to one P. G. Bowman, of Sumter, South Carolina, for whom it was intended by defendants; and they admit that they have not delivered $200 to the plaintiff, although he has demanded that sum.

II.—For a Second Separate Defense.

1. That prior to the 13th day of September, 1906, one
19 P. G. Bowman, of the City of Sumter, South Carolina, engaged defendants, except Sterrett Tate, to buy and sell for him in different names cotton for future delivery on the New York Cotton Exchange, and make the contracts on the exchange with brokers thereof in said defendants' own names, but carrying the contracts for said cotton for the use and benefit of said Bowman, and he promised and agreed with said defendants that he would be responsible to them for said contracts and would put up such margin thereon as the defendant might call on him for from time to time; and, upon said promise and agreement, said defendants had bought and sold and were carrying for said Bowman certain contracts for cotton to be delivered in the future and gave credit to said Bowman in regard to the liability thereon and to no other person than said Bowman.

2. That on September 13, 1906, in pursuance of said promise and agreement, said defendants were carrying for said Bowman contracts for five hundred bales of cotton to be delivered in January, 1907, and one thousand bales of cotton to be received in December, 1906, and they had in hand as margins therefor $503.41.

3. That on said 13th day of September, 1906, they received instructions from said Bowman to buy an additional one thousand bales of cotton to be delivered in November, 1906, saying margin was remitted, and in pursuance of said promise and agreement, they purchased, and entered into contract in their own names on said exchange for said number of bales, notified said Bowman of the same, and gave said Bowman credit thereon and only him; and on September 14, 1906, said defendants received instructions from said Bowman to buy an additional one hundred bales of cotton to be delivered in November, 1906, and an additional one hundred
20 bales of cotton to be delivered in December, 1906, and also informed them that margin was mailed that day, and in pursuance of said promise and agreement, said defendants purchased and entered into contracts in their own names, for said cotton, and notified said Bowman of the same and gave him credit thereon and only him.

4. That on September 17, 1906, upon said Bowman's instructions and in pursuance of said promise and agreement, said defendants bought one thousand bales of cotton to be received in December, 1906, and thereby closed out the sale of the aforesaid one thousand bales of cotton sold for delivery in December.

5. That on September 17, 1906, defendants not having received the margins, notified said Bowman, but only on September 19, after business hours and after repeated inquiry of him, did defendants receive from him, for margins, checks to the amount of $1,200, and they on some bank or banks at Sumter, South Carolina, which checks defendants deposited in bank in New York for collection at the bank or banks at said Sumter, but $1,000 thereof was not paid upon presentation in South Carolina, and of this non-payment said

Bowman was notified, and he made repeated promises to make the same good, but never did so.

6. That on September 21, 1906, said defendants, although thinking said check for $1,000 was good, called said Bowman for further margins on all contracts which they had entered into, but he did not furnish the same.

7. That on September 22, 1906, said defendants again called said Bowman for further margins on all the contracts which they had entered into, but he did not furnish the same.

21 8. That on September 24, 1906, said defendants again called said Bowman for further margins, on all the contracts which they had entered into, but he did not furnish the same.

9. That on September 25, 1906, said defendants again called said Bowman for further margins on all the contracts which they had entered into, but he did not furnish the same.

10. That on September 26, 1906, said check for $1,000 not having been made good and defendants not having heard from said Bowman on the call for further margins of September 25th, and not being able to reach him on long distance telephone which defendants tried to do on said September 25th, they sold one thousand bales of cotton for November delivery and notified said Bowman's office of the same.

11. That on the 28th day of September, 1906, said defendants received from said Bowman, who was then in the City of Washington and pretending to be on his way to New York to make his margins good, an order to sell one thousand bales of cotton to be delivered in December, 1906, and said defendants, in pursuance of said promise and agreement, sold, and entered into contract for, such one thousand bales and notified said Bowman of the same; and said Bowman came to New York, as they are informed and believes, and returned to Sumter, South Carolina, without seeing defendants and without complying with their request for margins.

12. That on October 1, 1906, said defendants notified said Bowman that unless he put up margins they would close out all of said contracts; and he refused to put up said margins.

22 13. That on October 2, 1906, defendants again called said Bowman for margins, and after giving him time to put up said margins, and he refusing to do so, said defendants purchased five hundred bales of cotton to be delivered in December, thus closing out a part of said contracts, and notified him of the same; and on October 3, 1906, after giving said Bowman ample time to put up said margins, said defendants closed out all other of said contracts and notified him of the same.

14. That upon the closing out of all of said contracts aforesaid, Bowman became indebted to defendants for money paid out by defendants on the same, and commissions, after deducting the margins on hand, in the sum of $3,002.34, no part of which has ever been paid by him, although payment has been demanded.

15. That said defendants never had any agreement with the plaintiff with regard to any of said contracts and never had any understanding or agreement that they were to send notices or calls for mar-

gin to any person except said Bowman; that they were under no obligation whatever to do so; and that they gave credit solely to said Bowman in making said contracts and looked solely to him for margins and were to notify him and him only when calls were to be made.

16. Upon information and belief, that plaintiff and said Bowman are residents of the same place and this action is brought at the suggestion of said Bowman to get money from defendants on part of said contracts without said Bowman paying what he owes on the others.

III.—For a Third and Separate Defense.

1. That the order to buy one hundred bales of cotton for November delivery and one hundred bales of cotton for December delivery mentioned in the complaint, was given by one P. G. Bowman,
23 of Sumter, South Carolina, and under the understanding and agreement had between said Bowman and defendants that said defendants were to call said Bowman for margin on said contracts whenever said defendants desired it, and defendants were not to call any one else for said margins.

2. That said defendants did call said Bowman for margin in regard to said contracts on September 14, 1906, and said Bowman's promised margin, but no check was received until late on September 19, 1906; that said defendants called said Bowman for $200 further margin on account of said contracts on September 21, 1906, and said Bowman refused and neglected to put up the same with defendants; that said defendants again called said Bowman for margin on said contracts on September 24, 1906, notifying him that they showed a loss of $50, which was after applying margin on hand, and said Bowman refused and neglected to put up said further margin; that on the 1st day of October, 1906, defendants notified said Bowman that unless he put up further margin they would not carry his contracts further, and said Bowman refused and neglected to put up said margin; and that on October 3, 1906, after defendants had waited a reasonable time for said Bowman to comply with their demand for margin, they closed all the contracts which they had been carrying on order of said Bowman.

3. Upon information and belief, that the plaintiff knew of said calls upon said Bowman by said defendants for margins, and of his refusals.

Wherefore defendants ask judgment that the complaint be dismissed and for costs and disbursements to them.

(Signed) JOHN R. ABNEY,
Defendants' Attorney, 27 *William Street*,
New York City, N. Y.

24 STATE OF NEW YORK,
County of New York, ss:

Nathaniel L. Carpenter, being duly sworn, deposes and says that he is one of the defendants above named; that he has read the foregoing and knows the contents there-, and that the same is true of

his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

NATHANIEL L. CARPENTER.

Sworn to before me this 27th day of March, 1907.
[SEAL.] SAMUEL SCHWARTZMAN.
Notary Public, N. Y. Co.

(Endorsed:) Notice of motion, affidavit and copy of pleadings.—Filed June 21, 1907.

25 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Affidavit.

COUNTY OF NEW YORK, *ss:*

Nathaniel L. Carpenter, being duly sworn, deposes and says in reply to the affidavit of Ernest E. Baldwin, dated 6th day of May, 1907:

I. That he is one of the defendants in the above stated action, and he verified the answer to the complaint herein, referred to in said affidavit of Ernest E. Baldwin, in that he reaffirms the statements made in said answer to said complaint.

II. That P. G. Bowman and the Sumter Banking and Mercantile Company, referred to in the notice attached to said affidavit of Ernest E. Baldwin, are, as he is informed and believes, both at and doing business at Sumter, South Carolina, where said affidavit states that the plaintiff is now in business; and that it is just as necessary in the preparation of the case for trial that the defendants and their attorney should have the opportunity of making copies and transcripts of and from the books, documents and writings of said Bowman, of said Sumter Banking and Mercantile Company, and of plain-
26 tiff, as it is for the plaintiff and his attorneys to have the opportunity to make copies and transcripts of and from defendants' books, documents and writings, as alleged in said affidavit.

III. That the defendants are in the business of commission cotton merchants, doing business on the New York Cotton Exchange, and the other members of said Cotton Exchange, and the firms doing business thereon, are more or less their rivals in business; and the interests of customers doing business through the members and firms of said Exchange are more or less antagonistic to each other, and said customers desire that their names and transactions be kept secret; it is therefore necessary that the books and papers of defendants be guarded and kept secret from any and all persons outside of the firm

and their clerks, until such an outsider proves himself to be incontestably interested in a transaction and having privity thereto with defendants.

IV. That deponent is informed and believes that the firm of Boothby & Baldwin are the attorneys for some members or firms of said Cotton Exchange other than defendants; and therefore it is against the interests of defendants' customers that defendants' books should be inspected by that firm or any member of it; and, as deponent does not know what relation, if any, there exists between plaintiff and said Bowman, and said Sumter Banking and Mercantile Company, deponent submits that defendants' books should not be opened to inspection to the plaintiff.

V. That defendants have long since given said Bowman the dates, showing when the contracts claimed by plaintiff were closed and terminated, at what price, and the amount realized, and also
27 the names of the members or firms of the said Cotton Exchange with whom said contracts were closed and terminated.

VI. That the firm of Boothby & Baldwin have been attorneys for said Cotton Exchange, as well as members and firms of the same, and ought to be familiar, and deponent is informed and believes they are familiar, with the books generally kept, and with the way in which members and firms of said Exchange keep them, and with the principle of the business of cotton commission merchants; and therefore it ought not to delay the orderly and speedy trial of the case, for defendants' books to be inspected on the trial, if they are decided to be admissible in evidence at all.

NATHANIEL L. CARPENTER.

Sworn to and subscribed before me this May 16, 1907.

[SEAL.] F. F. MILLER,
Notary Public.

(Endorsed:) Filed June 21, 1907.—John A. Shields, Clerk.

28 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Memorandum for Defendants in Opposition to Motion for an Order Directing Defendants to Produce All Their Books, Papers, etc., Before the Trial of This Action.

I.

Plaintiff has no right to see defendants' books at any time until he has proved on the trial that the defendants were his agents.

II.

The statute does not authorize the compulsion of defendants to produce their books before the trial and permit copies thereof to be taken.

III.

Plaintiff and his attorney have filed a complaint duly sworn to, alleging that he ordered the defendants to purchase the cotton mentioned; and therefore he does not need other evidence than he has in his possession, as he was willing to swear to the allegation on the proofs he had. He does not allege that the defendants have any of his papers.

29

IV.

If he needs any other evidence, Bowman and the Sumter Banking and Mercantile Company can furnish it. He knows what relation there was between him and them, and they know what happened between them and the defendants. There is no pretext that they are not able to furnish all the testimony there is on the plaintiff's side.

V.

Plaintiff is not permitted, under this statute, to inspect the books in order merely to search and know the evidence of defendants.

VI.

The statute does not apply where a subpœna *duces tecum* will reach the books at the time of the trial.

VII.

As to the transactions themselves, the defendants have given Bowman the names of the brokers from whom they bought and to whom they sold; and, under such circumstances, even the State Court would not permit an inspection of defendants' books.

VIII.

Plaintiff's attorneys should not be permitted to see the books, as they are attorneys for brokers who are rivals to defendants.

IX.

If plaintiff's attorneys are permitted to see the books, it should be only at the trial.

30

X.

The motion is premature and without merit and should be dismissed.

JOHN R. ABNEY,
Attorney for Defendants.

27 William Street, Borough of Manhattan, New York City, New York.

(Endorsed:) Filed June 21, 1907.

Order of June 25, 1907.

At a Stated Term of the United States Circuit Court for the Southern District of New York, Held in the United States Court House and Post Office Building in the City of New York, Borough of Manhattan, City of New York, on the 25th Day of June, 1907.

Present: Hon. George C. Holt, District Judge.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

A motion having been made by the plaintiff, upon notice, for an order directing the defendants to produce, before the trial of
31 this action, at such time and place as the Court may designate, all their books, papers, writings, account books, day books, blotters, journals, registers, cash books, bill books, letter books, sales books, check books, contracts, contract slips, and memoranda, made or received by them, their agents or employees, which contain any memoranda of any business transactions had for and in behalf of, or relating to, the plaintiff herein, for the years 1905 and 1906, and more particularly to the purchase and sale of two hundred bales of cotton, one hundred deliverable in November, and one hundred deliverable in December, 1906, or which relate in any way to the purchase and sale of said cotton, either alleged to have been made for the account of the plaintiff herein or P. G. Bowman of Sumter, South Carolina, or for the Sumter Banking and Mercantile Company, or any part of any such books, documents or writings which, in any way, refer to or contain entries of, or mention the two hundred bales of cotton set forth and described in the complaint herein, and permit the plaintiff, his attorneys or agents, at said time and place, to investigate, copy and make extracts from such documents, books and writings, and if the defendants should fail to comply with such order, should suffer judgment against them as in cases of nonsuit, and for other relief, which said motion having duly come on for hearing, and after hearing Ernest E. Baldwin, of counsel for the plaintiff, in favor of said motion, and John R. Abney, Esq., of counsel for the defendants, in opposition thereto; and after reading and filing the affidavit of Ernest E. Baldwin in support of said motion, verified the 6th day of May, 1907, and the complaint of the plaintiff herein, and the answer of the defendant herein, and the affidavit of Nathaniel L. Carpenter, verified the 16th day of June, 1907, in opposition thereto, and after due consideration, it is hereby

32 Ordered that the application for such inspection is hereby granted, and the defendants are required to produce all of their books, papers, writings, account books, day books, blotters, journals, registers, cash books, bill books, letter books, sales books, check books, contracts, contract slips and memoranda, made or received by them, their agents and employees, which contain any memoranda or any business transactions with, for and in behalf of, or relating to the plaintiff herein, for the year 1905 and 1906, and more particularly the purchase and sale of Two hundred bales of cotton, made in September and October, 1906, upon the New York Cotton Exchange, by the defendants, one hundred deliverable in November, 1906, and one hundred deliverable in December, 1906, or which relate in any way to the purchase and sale of said cotton, whether the entries appears to have been made for the account of the plaintiff or P. G. Bowman of Sumter, South Carolina, or for the account of the Sumter Banking and Mercantile Company, and any part of any such books, documents or writings which in any way refer to or contain entries, or mention the two hundred bales of cotton set forth and described in the complaint herein, and the plaintiff and his attorneys are hereby permitted, at the office of the defendants, at a suitable time between the date of this order and the 15th day of July next, to examine and investigate the same, and to make copies and extracts from such documents, books and writings. And it is further

Ordered that in the event the defendants fail to comply with this order, judgment against them shall be entered by default.

GEORGE C. HOLT, *U. S. J.*

(Endorsed:) Filed June 26, 1907.—John A. Shields, Clerk.

33 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

SIR: Please take notice that upon the annexed affidavit of Ernest E. Baldwin, verified the 16th day of July, 1907, and the pleadings, and all the papers herein, the plaintiff will move before the United States Circuit Court for the Southern District of New York, at Chambers, in the United States Court House and Post Office building, in the Borough of Manhattan, City of New York, on the 31st day of July, 1907, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for judgment by default against defendants, in favor of the plaintiff, pursuant to Section 724 of the Revised Statutes, for the failure of the defendants to comply with the order entered herein on the 25th day of June, 1907, granting plaintiff leave to examine the books, papers and documents

of the defendants, pertinent to the issue herein, and for such
34 other and further relief in the premises as to the Court may seem just and fit.

Dated N. Y., July 16th, 1907.

Yours, &c., BOOTHBY & BALDWIN,
Attorneys for Plaintiffs, No. 31 Nassau Street, Borough of Manhattan, City of New York.

To John R. Abney, Esq., Attorney for Defendants, No. 27 William Street, Borough of Manhattan, New York City.

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

STATE OF NEW YORK,
County of New York, ss:

Ernest E. Baldwin, being duly sworn, deposes and says: That he is a member of the firm of Boothby & Baldwin, the attorneys for the plaintiff herein.

35 That the summons and complaint in this action were served upon the defendants on the 20th day of January, 1907. On the 27th day of March, 1907, the defendants, individually and as copartners, served their answer.

On May 3d a note of issue was filed, placing this case upon the calendar of this Court, and on May 4th a notice of trial was duly served upon the defendants' attorney, John R. Abney, Esq., in the City of New York, who duly appeared in the action.

On May 6th a notice of motion was served upon defendants' said attorney for an inspection of defendants' books, under Section 724 of the Revised Statutes, a copy of which said notice of motion, together with the affidavits annexed thereto, are hereto attached marked Exhibit "A."

After a number of adjournments by stipulation, the said motion came on to be heard before Judge Holt, sitting in Circuit, and after hearing deponent in behalf of said motion, and John R. Abney, attorney for defendants, in opposition thereto, the motion made to inspect the books as aforesaid was granted, and an order to that effect was entered on June 25th, 1907, and on the 1st day of July said order was served on defendants' attorney, a copy of which is hereto attached marked Exhibit "B."

That on the 2d day of July, 1907, deponent made a demand upon the defendants for an examination of their books, papers and documents, etc., as provided in said order, and was subsequently notified by defendants' attorney, said John R. Abney, that he would notify deponent within a day or two whether or not his clients would comply with the order.

Subsequently and on the 9th day of July, 1907, the said John R. Abney notified deponent that his clients, the defendants in
36 this action, would not comply with the said order, as it was their purpose to contest the right of the Court to grant said order, and that his clients had instructed him to have the order reviewed by a higher Court, a copy of which notification is hereto attached marked Exhibit "C."

That the time within which defendants were to comply with said order and allow such inspection as aforesaid, has elapsed, and the terms of said order have in no way been complied with.

Wherefore plaintiff prays that judgment be given against the defendants by default, pursuant to Section 724 of the Revised Statutes, and that a writ of inquiry be issued to the marshal of the United States Circuit Court for the Southern District of New York, to assess the damages which the plaintiff has suffered by reason of the matters complained of against the defendants.

ERNEST E. BALDWIN.

Sworn to before me this 16th day of July, 1907.

LAMAR HARDY,
Notary Public, New York County.

EXHIBIT "A."

It is agreed that this copy of Notice of Motion is the same as the Notice of Motion above printed, dated May 6, 1907, and need not be printed.

EXHIBIT "A."

It is agreed that this copy of the affidavit of Ernest E. Baldwin is the same as the affidavit above printed, dated May 6, 1907, and need not be printed.

37 EXHIBIT "B."

It is agreed that this copy of the order of June 25, 1907, is the same as the order above printed, dated June 25, 1907, and need not be printed.

EXHIBIT "C."

John R. Abney,
Lord's Court Building, 27 William Street.

NEW YORK, *July* 9, 1907.

WINN
v.
JOSEPH N. CARPENTER et al.

Boothby & Baldwin, Esqrs., 31 Nassau Street, New York City.

DEAR SIRS: As the above case will not come on for trial for over a year at least, I cannot read section 724 of the United States Re-

vised Statutes as you and the learned Judge do; and I have been obliged to tell my clients so. They, with great respect for the court, and thinking that such an order as you have obtained is injurious to the cotton merchant business and their rights, and in further view that in other circuits it has been held that the court has no power or discretion to grant such an order, they have instructed me to carry the order up to the higher courts for review of the same. And to that end, and as your Mr. Baldwin, who has charge of the case for you, informs me that he wishes to go away for his vacation before July 15th, I now inform you that with great deference to the court, my clients have decided not to comply with the order, as that is the only way in which they can have it reviewed.

Yours truly,

(Sd.) JOHN R. ABNEY.

(Endorsed:) Affidavits and Notice of Motion for Judgment.—Filed July 16, 1907.

38 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Affidavit.

STATE OF NEW YORK,
County of New York, ss:

Nathaniel L. Carpenter, being duly sworn, deposes and says in opposition to plaintiff's motion for judgment against the above-named defendants:

1. That he is one of the defendants in the above-stated action, and he verified the answer to the complaint herein and also the affidavit in opposition to the motion upon which the order of June 25, 1907, was granted, a copy of which affidavit is hereto attached as Exhibit 1 and made part of this affidavit; and he reiterates all the statements made in his said former affidavit and contained in said copy hereto attached.

2. That said motion and this motion are made not only before the trial, but, as he is informed and believes, the above case will not come on for trial in its regular order on the calendar for over a year at least.

3. That, through their counsel, the defendants objected on the former motion that the Court had no jurisdiction, authority
39 or discretion to grant the said order of June 25, 1907; and, with great respect for the Court, the defendants have, for the reasons set forth in deponent's said former affidavit and the letter of their counsel annexed to the moving affidavit as Exhibit "C," declined to comply with said order.

Wherefore, upon the grounds set forth in said affidavit and letter,

defendants object that the Court has no jurisdiction, authority or discretion to grant this motion for judgment and a writ of inquiry; and they ask that the motion be dismissed.

NATHANIEL L. CARPENTER.

Sworn to before me this July 31, 1907.

[SEAL.] H. E. HAYNES,
Notary Public, No. 181, *Kings County, N. Y.*

Certificate filed in New York County.

(Endorsed:) Filed August 1, 1907.—John A. Shields, Clerk.

Affidavit of Nathaniel L. Carpenter, Dated May 16, 1907.

It is agreed that this copy of the affidavit of Nathaniel L. Carpenter is the same as the affidavit above printed, dated May 16, 1907, and need not be printed.

(Endorsed:) Filed August 1, 1907.—John A. Shields, Clerk.

40 At a Stated Term of the United States Circuit Court for the Southern District of New York, Held at the United States Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 31st Day of July, 1907.

Present: Hon. Charles M. Hough, District Judge.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

A motion having been made by the plaintiff upon notice, for an order for a judgment against the defendants by reason of their failure to comply with the order of this Court entered herein on the 25th day of July, 1907, granting plaintiff leave to examine the books, papers and documents of the defendants pertinent to the issue herein, and for other relief, upon the ground that the defendants and each of them had failed to comply with the provisions of said order, and denied plaintiff an opportunity to examine said books, papers and documents as provided for in said order; and said motion having come on for hearing, and after hearing Ernest E. Baldwin, of counsel for the plaintiff, in support of said motion, and John R. Abney having appeared for the defendant- in opposition thereto; and after reading and filing the affidavits of Ernest E. Baldwin, verified respectively the 6th day of May, 1907, and the 16th
41 day of July, 1907, and the said order, and the affidavit of Nathaniel L. Carpenter, verified July 31, 1907;

And it appearing to my satisfaction that the defendants, contrary to said order, declined and refused to allow the plaintiff to

examine and inspect their books, papers and documents, designated therein and pertinent to the issue herein, and make copies thereof, within the time mentioned in said order, or to comply with any of the terms thereof;

Now, therefore, upon the application of Boothby & Baldwin, attorneys for the plaintiff, and under and pursuant to Section 724 of the Revised Statutes of the United States, and the Rules of this Court with respect to defaults, it is

Ordered that the defendants, and each of them, are hereby declared to be in default, and the plaintiff is authorized and empowered to enter judgment against the defendants by default for such damages as he has suffered by reason of the matters set forth in the complaint herein and to assess which damages the Clerk of this Court is hereby directed to issue a writ of inquiry directed to the Marshal of the United States for the Southern District of New York to, as soon as possible and convenient, summon a jury to convene at the office of said Marshal in the United States Post Office and Court House Building, in the City of New York, upon such date as shall be designated in the writ, which said jury shall then and there legally determine and assess the damages that plaintiff has suffered by reason of the matters complained of in the complaint herein, whereupon the Clerk shall enter judgment for such amount in favor of the plaintiff, and against the defendants, and for the legal costs and disbursements.

C. M. HOUGH, *U. S. J.*

(Endorsed:) Filed Aug. 1, 1907.—John A. Shields, Clerk.

42 UNITED STATES OF AMERICA,
Southern District of New York, ss:

The President of the United States of America to the Marshal of the Southern District of New York, Greeting:

Whereas, in an action brought by David J. Winn against Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate in our Circuit Court for the Southern District of New York such proceedings were had upon the due personal service of the summons and complaint herein upon said Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, that the said David J. Winn obtained an order of the said Court for a writ of inquiry to be issued from this Court directed to the Marshal to determine the facts and assess the damages to be awarded to the plaintiff herein according — rules and practice of this Court, a copy of the complaint in said action being hereunto annexed;

Therefore, we command you that by the oaths of twelve good and lawful men of your district, you diligently inquire what damages the said David J. Winn hath sustained for and on account of the matters alleged in the said complaint, and that you on or before the 29th day of August, 1907, return to the office of the Clerk of said Court the inquisition taken by you by virtue of this writ, under your seal and the seals of those by whose oaths you shall take the inquisition, together with this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court for the Southern District of New York, this 29th day of August, 1907.

Attest my hand and seal of the United States Circuit Court
43 for the Southern District of New York, at the Clerk's office in the City of New York, this 27th day of August, 1907.

JOHN A. SHIELDS,
Clerk of the United States Circuit Court for the Southern District of New York.

(Endorsed:) United States Circuit Court, Southern District of New York.—David J. Winn, Plaintiff, against Joseph N. Carpenter *et al.*, Defendants.—Writ of Inquiry.—See U. S. Marshal's return inside.—August 29/07.

United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Marshal's Return.

The execution of the within writ appears by the inquisition here unto annexed.

WILLIAM HENKEL,
United States Marshal for the Southern District of New York.

August 29th, 1907.

44 United States Circuit Court, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Inquisition of Damages.

Inquisition taken at the office of the United States Marshal for the Southern District of New York, in the Federal Building, in the Borough of Manhattan, City of New York, on the 29th day of August, 1907, before William Henkel, United States Marshal, by virtue of the annexed writ to him delivered, to inquire of matters in the said writ specified by the oaths of John A. Bigelow, Thomas Henry, Henry Cunningham, John Neal, Clarence A. Parsons, Jr., Joseph Cullen, Thomas Sussman, William F. Searing, Thomas Moore, Charles B. Hoag, George G. Lush and Charles P. Hanson,

twelve good and lawful men of the said District, who, being chosen, tried and sworn, say upon their oath that David J. Winn, in said writ named, has sustained damages by reason of the premises in the said writ and annexed complaint mentioned in the amount of two thousand two hundred and seventy-five dollars ($2,275), with interest thereon from the 12th day of October, 1906, amounting to one hundred and twenty and 20/100 dollars ($120.00), total amount two thousand three hundred and ninety-five and 20/100 dollars ($2,395.20), with the costs of this action.

45 In witness whereof, as well I, the said Marshal for the Southern District of New York, as the said jurors, have set our seals to the said inquisition the day and year above written.

WILLIAM HENKEL,
United States Marshal for the Southern District of New York.

JOHN A. BIGELOW. [L. S.]
THOMAS HENRY. [L. S.]
HENRY CUNNINGTON. [L. S.]
JOHN NEAL. [L. S.]
CLARENCE A. PARSONS. [L. S.]
JOSEPH CULLEN. [L. S.]
THOMAS SUSSMAN. [L. S.]
WILLIAM F. SEARING. [L. S.]
THOMAS MOORE. [L. S.]
CHARLES B. HOAG. [L. S.]
GEORGE G. LUSH. [L. S.]
CHARLES P. HANSON. [L. S.]

DAVID J. WINN
vs.
JOSEPH N. CARPENTER et al.

We, the undersigned jurymen, have received from William Henkel, United States Marshal for the Southern District of New York, the sum of three ($3) dollars each for services rendered as jurors on August 29th, 1907, in the above-entitled inquiry.

Foreman: JOHN A. BIGELOW.
THOMAS HENRY.
HENRY CUNNINGHAM.
JOHN NEAL.
CLARENCE A. PARSONS.
JOSEPH CULLEN.
THOMAS SUSSMAN.
WILLIAM F. SEARING.
THOMAS MOORE.
CHARLES B. HOAG.
GEORGE G. LUSH.
CHARLES P. HANSON.

46 I hereby certify that the above statement is correct.
WILLIAM HENKEL,
United States Marshal, S. D. N. Y.

Dated New York, August 29th, 1907.

(Endorsed:) Filed Aug. 29, 1907.—John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

DAVID J. WINN, Plaintiff,
against
NATHANIEL L. CARPENTER, JOSEPH N. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

The complaint in this action was served upon the defendants on the 30th day of January, 1907. The defendants duly appeared, and upon the 27th day of March, 1907, served their answer.

Upon the 21st day of June, 1907, the plaintiff made a motion to inspect the books, documents and other writings in the possession of the defendants concerning matters pertinent to the issue herein, which motion was decided in favor of the plaintiff. Whereupon the defendants declined to comply with said order and permit an inspection of their said books, documents and papers, etc., provided for therein, and the time in which said inspection and examination was to be had expired without such inspection and examination being permitted by the defendants, or any part of said order upon their part being complied with.

47

Whereupon plaintiffs made a motion for judgment by default under the provision of Section 724 of the Revised Statutes of the United States, which motion was duly granted, and an order made to that effect, ordering the Clerk of this Court to direct a writ of inquiry to the Marshal of the United States of this District to summon and convene a jury, who should assess such damages as plaintiff had suffered in the premises.

Thereafter, and on the 27th day of August, in pursuance of said order, the Clerk of this Court duly issued such writ of inquiry to the said United States Marshal, who, in compliance therewith, upon the 29th day of August, 1907, duly called and impanelled said jury, who, upon being chosen, tried and sworn, and upon their oath, found that the plaintiff herein had sustained damages by reason of the premises in said writ mentioned to the amount of two thousand two hundred and seventy-five (2,275) dollars, and therefore the damages sustained by the plaintiff by reason of the matters alleged in the complaint having thus been duly assessed at the said sum of two thousand two hundred and seventy-five (2,275) dollars, pursuant to said writ of inquiry by the said jury, under the direction of this Court, and after due notice to the defendants, and plaintiff's costs having been duly taxed at sixty-five and 45/100 (65.45) dollars.

Now, on motion of Boothby & Baldwin, attorneys for the plaintiff,

It is adjudged that the plaintiff, David J. Winn, recover of the defendants, Nathaniel L. Carpenter, Joseph N. Carpenter, Atmore L. Baggot and Sterrett Tate, two thousand two hundred and seventy-five (2,275) dollars, the damages thus assessed, with sixty-
48 five and 45/100 (65.45) dollars costs, as taxed, amounting in all to the sum of twenty-three hundred and forty and 45/100 dollars. Judgment this 18th day of September, 1907.

(Signed) JOHN A. SHIELDS, *Clerk.*

(Endorsed:) Filed Sept. 18, 1907.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

At Law.

DAVID J. WINN, Plaintiff,
against
JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Defendants.

Assignment of Errors.

Come now the defendants and file the following assignments of errors upon which they and each of them will rely upon their prosecution of the writ of error in the above-entitled cause:

I. That the United States Circuit Court, in and for the Southern District of New York, erred in passing the order of June 25th, 1907, granting the application of the plaintiff for an inspection of all defendants' books, papers, writings, account books, day books, blotters, journals, registers, cash books, bill books, letter books sales books, check books, contracts, contract slips and memoranda, made or received by them, their agents or employees, which contain any
49 memoranda of any business transactions had for and in behalf of, or relating to, the plaintiff herein, for the years 1905 and 1906, and more particularly of the purchase and sale of two hundred bales of cotton, one hundred deliverable in November and one hundred deliverable in December, 1906, or which relate in any way to the purchase and sale of said cotton, either alleged to have been made for the account of the plaintiff herein or P. G. Bowman, of Sumter, South Carolina, or for the Sumter Banking and Mercantile Company, or any part of any such books, documents or writings which, in any way, refer to or contain entries of, or mention the two hundred bales of cotton set forth in the complaint herein, and requiring defendants, before the 15th day of July, 1907, which was long before the case could be reached on the calendar for trial, to produce the same, and permit plaintiff and his attorneys to examine and investigate the same, over the objection by the defendants, through their attorney, that Section 724 of the Revised Statutes of the United States does not authorize the compulsion of defendants to produce the same before the trial of said cause.

II. That said Court erred in passing the order of June 25th, 1907, granting the application of said plaintiff to permit him and his attorneys to make copies and extracts from said documents, books and writings, and directing said defendants to permit plaintiff and his attorneys to make copies and extracts from the same before July 15, 1907, which was long before the case could be reached on the calendar for trial, over the objection by said defendants, through their attorney, that Section 724 of the Revised Statutes of the United States does not authorize the compulsion of defendants to permit copies of their said documents, books and writings to be made before the trial.

50 III. That said Court erred in passing said order of June 25th, 1907, granting the application of plaintiff for the direction that the defendants, upon default to comply with said order and produce their documents, books and writings before July 15, 1907, which was long before the case could be reached on the calendar for trial, should suffer judgment against them as in cases of nonsuit, and in directing that the defendants, upon failure to comply with said order, should suffer judgment against them, as cases of nonsuit, over the objection by defendants, through their attorney, that Section 724 of the Revised Statutes of the United States does not authorize the granting of such judgment before the trial of the case.

IV. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same, and to make copies and extracts therefrom, over the objection by defendants, through their attorney, that plaintiff had no right to see defendants' books at any time until he had proved on the trial that defendants were his agents.

V. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objection by defendants, through their

51 attorney, that plaintiff did not allege or show that defendants had any of his papers, or that plaintiff had any need for an examination or inspection of the same, inasmuch as the complaint shows that plaintiff's attorneys were willing to swear to the complaint on the proofs that he had.

VI. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objection by defendants, through their attorney, that if plaintiff needed any other evidence than he had it could be

given by Bowman and the Sumter Banking and Mercantile Company, who reside in the same town with plaintiff, in Sumter, South Carolina.

VII. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objection by defendants, through their attorney, that the motion to inspect the books was merely in order to search and know the evidence of the defendants.

IX. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said
52 order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objection by defendants, through their attorney, that the books of the defendants are here within the jurisdiction of the Court and a subpœna *duces tecum* will produce them on the trial.

X. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objections by defendants, through their attorney, that the defendants have given Bowman the names of the brokers of whom they bought and to whom they sold.

XI. The said Court, if it had discretion to direct defendants to produce their documents, books and writings for examination and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom over the objection by defendants, through their attorney, that plaintiff's attorneys are attorneys for brokers who are rivals of defendants, and therefore should not be permitted to see defendants' books.

XII. That said Court, if it had discretion to direct defendants to produce their documents, books and writings for examina-
53 tion and inspection by the plaintiff and his attorneys before the trial of the action, erred in the exercise of said discretion in passing said order of June 25th, 1907, permitting the plaintiff and his attorneys to examine and investigate the same and to make copies and extracts therefrom, over the objection by defendants, through their attorney, that if plaintiff's attorneys should be permitted to see the books of the defendants it should be only at the

trial, where, if they are ruled to be admissible as testimony for plaintiff, plaintiff's attorneys could easily understand the items.

XIII. That the United States Circuit Court, in and for the Southern District of New York, erred in passing the order of July 31, 1907, at least a year before the case could be reached on the calendar for trial, granting the application of the plaintiff for judgment by default against the defendants and in favor of the plaintiff, pursuant to Section 724 of the Revised Statutes of the United States, and declaring the defendants to be in default and authorizing and empowering plaintiff to enter judgment against the defendants by default and directing that a writ of inquiry be issued to assess the damages and for legal costs and disbursements, over the objection by the defendants that said Court had no jurisdiction, authority or discretion to grant said order declaring the defendants to be in default and authorizing and empowering the plaintiff to enter judgment against the defendants by default and to issue a writ of inquiry to assess the damages before the trial of the action.

XIV. That the said Court erred in granting judgment by default under the provisions of Section 724 of the Revised Statutes of the United States, directing that the plaintiff, David J. Winn, recover of the defendants, Joseph N. Carpenter, Nathaniel L. Car-
54 penter, Atmore L. Baggot and Sterrett Tate, two thousand two hundred and seventy-five ($2,275) dollars with sixty-five and 45/100 ($65.45) dollars costs, amounting in all to the sum of twenty-three hundred and forty and 45/100 ($2,340.45) dollars, and in entering said judgment against said defendants in favor of said plaintiff on the 18th day of September, 1907, a year at least before the case could be reached on the calendar for trial, and therefore contrary to the provisions of said Section 724 of the Revised Statutes of the United States and contrary to law.

Wherefore, the said defendants and plaintiffs in error pray that the judgment of the said Court and the said orders of June 25th, 1907, and July 31st, 1907, be reversed.

JOHN R. ABNEY,
Attorney for Defendants and Plaintiffs in Error.

(Endorsed:) Filed Oct. 16, 1907.—John A. Shields, Clerk.

55 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

DAVID J. WINN
vs.
NATHANIEL L. CARPENTER, JOSEPH N. CARPENTER, ATMORE L. BAGGOTT, and STERRETT TATE, Defendants.

Bond for Damages and Costs.

Know all men by these presents, That the United States Fidelity and Guaranty Company, having an office and principal place of business at No. 61 Liberty Street, in the City of New York, County

and State of New York, is held and firmly bound unto the above-named David J. Winn in the sum of twenty-eight hundred and seventy-two dollars, to be paid to the said David J. Winn, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 11th day of October, in the year of our Lord one thousand nine hundred and seven.

Whereas, the above-named Nathaniel L. Carpenter, Joseph N. Carpenter, Atmore L. Baggott and Sterrett Tate have prosecuted their writ of error to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above-entitled suit, by the judge of the Circuit Court of the United States for the Southern District of New York.

56 Now, therefore, the condition of this obligation is such that if the above-named Nathaniel L. Carpenter, Joseph N. Carpenter, Atmore L. Baggott and Sterrett Tate shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Sealed and delivered, and taken and acknowledged this 11th day of Oct., 1907, before me.

THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:

GEORGE E. HAYES,
Attorney-in-Fact.

At a regular meeting of the Board of Directors of The United States Fidelity and Guaranty Company, duly called and held on the sixth day of May, A. D. 1907, at the office of the company, in the City of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, that Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or George E. Hayes, or Charles W. Young, or Alonzo G. Oakley, or W. C. Shryver, or Gilman Ashburner, or Louis B. Caziarc, or Harry C. Harden, or Adolphus A. Jackson, or A. Van Tambacht, attorneys-in-fact of this company, in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the company to any and all bonds and undertakings for or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts

57 other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named as occasion may require.

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said

company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the City of New York this 11th day of October, 1907.

GEORGE E. HAYES,
Attorney-in-Fact.

STATE OF NEW YORK,
City and County of New York, ss:

On this 11th day of October, 1907, before me personally appeared Sylvester J. O'Sullivan, manager of the United States Fidelity and Guaranty Company, in the State of New York, with whom I am personally acquainted, who, being by me duly sworn, said: That he resides in the State of New York; that he is manager of the United States Fidelity and Guaranty Company in the State of New York, the corporation described in and which executed the above instrument; that he knows the corporate seal of said company; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of Board of Directors, and that he signed his name thereto as manager by like authority.

And the said Sylvester J. O'Sullivan further says that he is acquainted with George E. Hayes and knows him to be one of
58 the attorneys-in-fact of the said company; that the signature of the said George E. Hayes subscribed to the said instrument is in the genuine handwriting of the said George E. Hayes and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said Sylvester J. O'Sullivan.

DANIEL C. DEASY,
Notary Public, New York County.

(Endorsed:) Approved October 16, 1907, Geo. C. Holt, J.—Filed Oct. 16, 1907.—John A. Shields, Clerk.

59 By the Honorable George C. Holt, U. S. District Judge holding Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to David J. Winn, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 12th day of November, 1907, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggott and Sterrett Tate are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error men-ioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 16th day of October, in the year of our Lord one thousand nine hundred

seven, and of the Independence of the United States the one hundred and thirty-second.

GEORGE C. HOLT,
U. S. District Judge Holding Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) Copy received October 17, 1907. Boothby & Baldwin, att'ys for def't in error.—Filed Oct. 17, 1907.—John A. Shields, Clerk.

60 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Plaintiffs in Error,
against
DAVID J. WINN, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the foregoing contains all of the record herein certified by the Clerk of the United States Circuit Court, which is necessary or material to be printed, and that the foregoing agreements shall be printed in lieu of the several papers omitted.

Dated New York, December 24, 1907.

JOHN R. ABNEY,
Attorney for Plaintiffs in Error.
BOOTHBY & BALDWIN,
Attorneys for Defendant in Error.

So ordered.

E. HENRY LACOMBE,
U. S. C. J.

61 United States Circuit Court of Appeals for the Second Circuit.

No. 19, October Term, 1908.

Argued October 13, 1908; Decided November 16, 1908.

JOSEPH N. CARPENTER et al., Plaintiffs in Error,
vs.
DAVID J. WINN, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Judges Lacombe, Coxe, and Ward.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, entered against

plaintiffs in error who were defendants below. The action was brought at law to recover damages claimed to have been sustained on contracts for the purchase of cotton on the floor of the New York Cotton Exchange, which contracts plaintiff below alleged he employed defendants to make in their own names but in his behalf. It was alleged that they sold out the same without calling on him for margin and without his consent.

After the cause was at issue plaintiff made a motion under Sec. 724 of the U. S. Revised Statutes for an order directing defendants to exhibit their books before trial and permit plaintiff to investi-
gate copy and make abstracts of the same. The motion was
62 granted and order to that effect made and served. Defend-
ants refused to comply with such order on the ground that the court had not authority to make it. Thereupon, motion being duly made, the court gave judgment against defendants by default, as prescribed in the section above cited.

Per Curiam:

The question whether under Sec. 724 a party could be required to produce his books and papers before trial is one which has been frequently considered; the decisions rendered in different districts are not harmonious. A very full review of these decisions will be found in *Bloede v. Bancroft* (C. C. District of Delaware) (98 F. R. 175) where it was held that production of the books in advance of trial could be required. Since that decision, however, the Circuit Court of Appeals in the Third Circuit has held the other way. *Cassatt v. Mitchell Coal & Coke Co.* (150 F. R. 32). A majority of us are in accord with the reasoning and conclusion in *Bloede v. Bancroft,* and since the practice there approved has been the practice in this circuit for several years and is in harmony with the provisions of the State Code of Procedure we are all unwilling to adopt the conclusions of the Court of Appeals of the Third Circuit. Moreover the weight of decisions in the different circuits seems to be in accord with *Bloede v. Bancroft.* It is unfortunate, perhaps, that there should be diversity in the practice in different circuits, but the remedy for that would be an application for *certiorari* to the Supreme Court.

The judgment is affirmed.
John R. Abney, for the Plaintiffs in Error.
Ernest E. Baldwin, for the Defendant in Error.

63 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 27th day of November, one thousand nine hundred and eight.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

JOSEPH N. CARPENTER et al., Plaintiffs in Error,
vs.
DAVID J. WINN, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

E. H. L. It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

64 Endorsed: United States Circuit Court of Appeals, Second Circuit. J. N. Carpenter vs. D. J. Winn. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 27, 1908. William Parkin, Clerk.

65 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 64 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Joseph N. Carpenter et al. against David J. Winn as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of December in the year of our Lord One Thousand Nine Hundred and Eight and of the Independence of the United States the One Hundred and thirty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate are plaintiffs in error, and David J. Winn is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the

67 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of February, in the year of our Lord one thousand nine hundred and nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

68 [Endorsed:] File No. 21,479. Supreme Court of the United States. No. 683, October Term, 1908. Joseph N. Carpenter et al. vs. David J. Winn. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 5, 1909. William Parkin, Clerk.

69 United States Circuit Court of Appeals for the Second Circuit.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT, and STERRETT TATE, Plaintiffs in Error,
against
DAVID J. WINN, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed that the certified transcript of the record of this case filed in the office of the Clerk of the Supreme Court of the United States with the application for the writ of certiorari may be taken as a return to the writ of certiorari granted herein, dated the 1st day of February 1909.

Dated, New York, February 3, 1909.

JOHN R. ABNEY,
Attorney for Joseph N. Carpenter et al., Plaintiffs in Error.

BOOTHBY & BALDWIN,
Attorneys for David J. Winn, Defendant in Error.

70 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, Plaintiffs in Error, against David J. Winn, Defendant in Error. Stipulation. John R. Abney, Attorney for pl'ffs in error, 27 William Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 5, 1909. William Parkin, Clerk.

71 To the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the Clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as a return to the writ of certiorari issued herein.

Dated New York, February 6th, 1909.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

72 [Endorsed:] 683, 21479. United States Circuit Court of Appeals, Second Circuit. Joseph N. Carpenter et al. v. David J. Winn. Return to Certiorari.

73 [Endorsed:] File No. 21,479. Supreme Court U. S., October Term, 1908. Term No. 683. Joseph N. Carpenter et al., Petitioners, vs. David J. Winn. Writ of Certiorari and return. Filed Feb'y 9th, 1909.

The Supreme Court of the United States,

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,

Petitioners,

against

DAVID J. WINN,

Respondent.

Petition for Writ of Certiorari.

JOHN R. ABNEY,

Counsel for Petitioners.

E. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

The Supreme Court of the United States,

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners,

against

DAVID J. WINN,
Respondent.

Petition for Writ of Certiorari to Circuit Court of Appeals. 2

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE UNITED STATES.

Your petitioners, Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, respectfully represent: 3

I.—That they are cotton merchants doing business in the City of New York, State of New York, under the firm name of Carpenter, Baggot & Company, and are citizens and residents of said State, except Joseph N. Carpenter, who is a citizen and resident of the State of Mississippi.

II.—That an action at law was brought by David J. Winn, the above-named respondent, suing

4 as a citizen and resident of the State of South Carolina, against them in the United States Circuit Court for the Southern District of New York, to recover alleged damages claimed by him to have been sustained by him on contracts for the purchase of two hundred bales of cotton on the floor of the New York Cotton Exchange, which contracts he alleged he employed them to make in their own names but in his behalf and they sold out the same without calling on him for margins and without his consent (Record, folios 20-31).

III.—That your petitioners served their answer
5 to the complaint, and therein denied among other things that they were ever employed by respondent to buy any cotton or carried any cotton for him or gave him any credit; but they said that they bought a number of bales of cotton for one Bowman and gave him alone credit and frequently called on him for margin, and on his failure to give them margin they sold out the cotton at a loss and notified him to pay them the balance, and that in that lot of cotton were the two hundred bales claimed by defendant in error in his complaint to have been his (Record, 50-69).

6 IV.—That after the service of the answer, the earliest term of the Court for which the case could be noticed for trial, and upon the calendar of which it could go, was the term beginning the third Monday in October, 1907, (Revised Statutes of U. S., §658).

V.—That after the service of the answer the counsel for respondent served upon the counsel for your petitioners a notice wherein they stated that they would make a motion

"for an order directing that the defendants produce, *before the trial of this action,* at such time and place as the Court may designate, all their books, papers, writings, accounts books, day books, blotters, journals, registers, cash books, bill books, letter books, sales books, check books, contracts, contract slips and memoranda made or received by them, their agents or employees, which contain any memoranda of any business transactions had for and in behalf of or relating to the plaintiff herein, for the years 1905 and 1906, and more particularly of the purchase and sale of two hundred (200) bales of cotton, one hundred (100) deliverable in November, 1906, and one hundred (100) deliverable in December, 1906, or which relate in any way to the purchase and sale of said cotton, whether alleged to have been made for the account of the *plaintiff* herein, or *P. G. Bowman,* of Sumter, South Carolina, or for the *Sumter Banking and Mercantile Company,* or any part of any such books, documents and writings, which in any way refer to or contain entries of, or mention the two hundred bales of cotton set forth and described in the complaint herein; *and permit the plaintiff,* his attorneys and agents, at said time and place, *to investigate, copy and make abstracts* of such documents, books and writings, *and directing* that the defendant, upon failure to comply with said order, *shall suffer judgment* against him, as in cases of nonsuit, and for such other and further relief as to the Court may seem just and proper" (Record, 32-71). 7 8 9

VI.—That this motion was made under §724 of the U. S. Revised Statutes, (Record, 103-104).

VII.—That your petitioners opposed said motion on the grounds that the Court was without

jurisdiction, authority, or discretion, to grant an order directing an exhibit of books and papers *before the trial,* and if it had jurisdiction, such an exercise of discretion would not be correct, (Record, 73-88, 114-115).

VIII.—That on June 25, 1907, Mr. Justice Holt, before whom said motion was made, passed an order which, after reciting that the motion had been made "by the plaintiff, upon notice, for an order directing defendants to produce *before the trial of this action*", etc., directed

> "*that the application for such inspection is hereby granted,* and the defendants are required to produce all of their books, papers, writings, account books, day books, blotters, journals, registers, cash books, bill books, letter books, sales books, check books, contracts, contract slips and memoranda, made or received by them, their agents and employees, which contain any memoranda or any business transactions with, for and in behalf of, or relating to the plaintiff herein, for the year 1905 and 1906, and more particularly the purchase and sale of Two hundred bales of cotton, made in September and October, 1906, upon the New York Cotton Exchange, by the defendants, one hundred deliverable in November, 1906, and one hundred deliverable in December, 1906, or which relate in any way to the purchase and sale of said cotton, whether the entries appears to have been made for the account of the plaintiff or P. G. Bowman of Sumter, South Carolina, or for the account of the *Sumter Banking and Mercantile Company,* and any part of any such books, documents or writings which in any way refer to or contain entries, or mention the two hundred bales of cotton set forth and described in

the complaint herein, and the plaintiff and his attorneys are hereby permitted, at the office of the defendants, at a suitable time *between the date of this order and the 15th day of July, next,* to *examine and investigate* the same, and to *make copies and extracts* from such documents, books and writings. And it is further

Ordered that in the event the defendants fail to comply with this order, judgment against them shall be entered by default" (Record, 89-96).

IX.—That the 15th day of July, 1907, was more than three months before the term of the court began and at least a year before the case could be reached on the calendar for trial (Record, 114), and the trial court was then in vacation.

X.—That on July 9, 1907, your petitioners' counsel wrote to the counsel for respondent the following letter:

"*Dear Sirs.*—As the above case will not come on for trial for over a year at least, I cannot read section 724 of the United States Revised Statutes as you and the learned Judge do; and I have been obliged to tell my clients so. They, with great respect for the court, and thinking that such an order as you have obtained is injurious to the cotton merchant business and their rights, and in further view that in other circuits it has been held that the court has no power or discretion to grant such an order, they have instructed me *to carry the order up to the higher courts for review of the same.* And to that end, and as your Mr. Baldwin, who has charge of the case for you, informs me that he wishes to go away for his vacation before July 15th, I now inform you that with great deference to the

court, my clients have decided not to comply with the order, *as that is the only way in which they can have it reviewed.*

Yours truly,

(Sd.) JOHN R. ABNEY."

(Record, 109-111.)

XI.—That on July 16, 1907, while the trial court was in vacation, counsel for respondent made a motion before Mr. Justice Hough for judgment against your petitioners by default, "pursuant to Section 724 of the Revised Statutes," and for a writ of inquiry to be issued to the marshal to as-
17 sess the damages (Record, 97, 111).

XII.—That petitioners filed affidavits in opposition to said motion contending that the court had not authority to grant judgment or the writ, and that if it did it would be an improper exercise of discretion (Record, 112, 117).

XIII.—That on the 31st day of July, 1907, and while the trial court was in vacation, an order was made by Mr. Justice Hough, reciting that it was under and pursuant to § 724 of the Revised Statutes of the United States, and declaring defend-
18 ants to be in default, and authorizing and empowering the plaintiff to enter judgment against them by default and directing the Clerk of the Court to issue a Writ of Inquiry to the Marshal to summon a jury to determine and assess the damages that plaintiff had suffered by reason of the matters complained of in the complaint, whereupon the Clerk should enter judgment for such amount in favor of the plaintiff against the defendants and for legal costs and disbursements (Record, 118-123).

XIV.—That on August 27, 1907, and while the trial court was in vacation, a writ of inquiry was issued to the Marshal (Record, 124-127).

XV.—That on August 29, 1907, and while the trial court was in vacation, the Marshal made a return on said writ (Record, 128-135).

XVI.—That on September 18, 1907, and while the trial court was in vacation, a judgment for $2,275, and $65.49 costs, was entered upon said return of the Marshal against your petitioners (Record, 138-142).

XVII.—That thereupon your petitioners sued out a writ of error to have the judgment and orders upon which it was based reviewed by the Circuit Court of Appeals for the Second Circuit in the Southern District of New York, and filed an assignment of errors and the supersedeas bond required by law (Record, 1-16, 142-172).

XVIII.—That the errors assigned raised the questions whether the Court had authority to enter said judgment and make said orders, and if it had authority, whether its discretion was properly exercised (Record, 143-161).

XIX.—That on the 16th day of November, 1908, said Circuit Court of Appeals filed an opinion as follows:

"PER CURIAM.

The question whether under Sec. 724 a party could be required to produce his books and papers before trial is one which has been frequently con-

sidered: the decisions rendered in different districts are not harmonious. A very full review of these decisions will be found in Bloede *v.* Bancroft (C. C. District of Delaware), 98 F. R., 175, where it was held that production of the books in advance of trial could be required. Since that decision, however, the Circuit Court of Appeals in the Third Circuit has held the other way. Cassatt *v.* Mitchell Coal & Coke Co., 150 F. R., 32. A majority of us are in accord with the reasoning and conclusion in Bloede *v.* Bancroft, and since the practice there approved has been the practice in this circuit for several years and is in harmony with the provisions of the State Code of Procedure we are all unwilling to adopt the conclusions of the Court of Appeals of the Third Circuit. Moreover, the weight of decisions in the different circuits seems to be in accord with Bloede *v.* Bancroft. It is unfortunate, perhaps, that there should be diversity in the practice in different circuits, but the remedy for that would be an application for certiorari to the Supreme Court.

The Judgment is affirmed."

XX.—That on the 27th day of November, 1908, the said Circuit Court of Appeals entered its judgment, whereby it was ordered, adjudged and decreed that the judgment of the Circuit Court be, and the same was thereby affirmed with costs, and a mandate directed to be issued to the Circuit Court in accordance with said judgment or decree (Record, folios 187-189). A certified copy of the entire case in the Circuit Court of Appeals for the Second Circuit, and of the opinion and judgment of that Court is hereto annexed as part

of this application in conformity with Rule 37 of this Honorable Court, relative to cases from the United States Circuit Court of Appeals, and the same is marked "Exhibit A." 25

XXI.—That your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act. 26

XXII.—That your petitioners are advised and believe that the said case was decided by the said Circuit Court of Appeals under the view taken by said Court, that Section 724 of the Revised Statutes of the United States authorizes and empowers the Circuit Courts of the United States to require a party to an action at law to show his books and allow copies thereof to be taken by the opposing party to action *before the trial* of the action, and to grant judgment by default *before the trial,* in the event that the party fails to show his books and allow copies thereof to be taken in obedience to said requirement; your petitioners are advised and believe that said Section 724 of the Revised Statutes does not grant such power or authority to the Circuit Court, and that 27

the Circuit Court had no authority or power to grant the judgment above mentioned, or the above mentioned orders upon which it was based, and could only have done so *in* the trial of the action. And your petitioners are further advised and believe, as is stated in the opinion of said Circuit Court of Appeals, that the Circuit Court of Appeals of the Third Circuit has decided and holds that said section 724 does not give power or authority to the Circuit Courts of the United States to order books of parties to be exhibited to an opposite party in a case *before* the trial thereof; that the United States Circuit Courts in certain other States also have decided that said Section 724 does not give said authority; and that there is therefore a lack of uniformity of decision in construing said section and in determining the power and authority of the Circuit Courts of the United States to require books and papers of parties to be exhibited *before* the trial of an action and to grant judgment *before* the trial of the action, in the event of parties failing or declining to show their books; and, furthermore, that they are advised that the weight of authority is against the decision of the Circuit Court of Appeals in this case, and the same should be reversed, and the judgment of the Circuit Court should be reversed, upon the following grounds:

1. Because the Circuit Court had no authority to grant the judgment against your petitioners *before* the trial of the action.

2. Because the Circuit Court had no authority to grant the order of July 31, 1907, *before* the trial of the action.

3. Because the Circuit Court had no authority to grant the order of June 25, 1907, *before* the trial of the action. 31

XXIII.—And the question presented by this case therefore is: Does § 724 of the Revised Statutes give the Circuit Courts power or authority to require the production of books and papers to be examined and copied by the opposite party before the trial of an action of law? It is of great importance to the public generally to have uniformity of decisions in the construction of said Section 724 of the Revised Statutes; and it is of great importance, especially to merchants and 32 others financially interest in interstate commerce, as well as domestic, and to merchants like your petitioners, who have cases in several circuits, to know whether the decision in this case is correct and to be free from such requirements; and it is important in their line of business especially that the contracts of their customers should not be exposed to persons who do not show their right to have knowledge of them by evidence, where opportunity is given to cross examine.

XXIV.—That your petitioners are agrieved by the judgment of the Circuit Court of Appeals for 33 the Second Circuit, in that the affirmance by said Circuit Court of Appeals of the judgment of the Circuit Court against your petitioners was erroneous as matter of law and the decision of the said Circuit Court of Appeals was contrary to the law and the constitutional and common law right of your petitioners, and not in uniformity with the decision of another Circuit Court of Appeals of the United States; all of which more particularly

34 appears by the printed brief and argument of your petitioners upon the facts and law submitted herewith.

XXV.—Your petitioners thus respectfully submit that the questions upon the construction and effect of § 724, involved in your petitioners' said case, should be finally and authoritatively adjudged by this Honorable Court upon and after a full presentation of the merits to the Court on the part of your petitioners and the respondent. Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and
35 under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record and proceedings of the said Circuit Court of Appeals in the said case therein entitled Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, plaintiffs in error *v.* David J. Winn, defendant in error, No. 19, to the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the act of Congress, entitled
36 "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners, etc.,
Dated, New York, January 2, 1909. 37

CARPENTER, BAGGOT & Co.,
Petitioners.

JOHN R. ABNEY,
Counsel.

By Sterrett Tate

STATE OF NEW YORK,
County of New York, } ss.:

STERRETT TATE, being duly sworn, deposes and says: That he is one of the petitioners above named; that he has read the foregoing petition and 38
knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

STERRETT TATE.

Sworn to before me this
2d day of January, 1909.

WILLIAM ST. JOHN TOZER,
Notary Public,
[SEAL.] N. Y. County.

39

40 THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners,

against

41 DAVID J. WINN,
Respondent.

Notice of Application to Supreme Court for Writ of Certiorari.

The respondent is hereby notified that the above named petitioners will on Monday, January 11, 1909, upon their verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion, a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you,
42 to the Supreme Court of the United States, in its court room, in the City of Washington, D. C.

JOHN R. ABNEY,
Attorney for Petitioners,
27 William Street,
Borough of Manhattan,
New York City,
New York.

To BOOTHBY & BALDWIN, Esqrs.,
31 Nassau Street,
New York City, New York.

THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners,

against

DAVID J. WINN,
Respondent.

Motion for Writ of Certiorari From the Supreme Court to Circuit Court of Appeals for the Second Circuit.

Come now Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, by John R. Abney, their counsel, and move this honorable Court that it shall by certiorari or other proper process directed to the honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the respondent, David J. Winn, was defendant in error, and your petitioners, Joseph N. Carpenter, Nathaniel L. Carpenter, Atmore L. Baggot and Sterrett Tate, plaintiffs in error, and to that end they now tender herewith their petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

JOHN R. ABNEY,
Counsel.

The Supreme Court of the United States

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,

Petitioners,

against

DAVID J. WINN,

Respondent.

Brief on Application for Writ of Certiorari.

JOHN R. ABNEY,

Counsel for Petitioners.

R. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners.

against

DAVID J. WINN,
Respondent.

BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

Facts.

This is an application for a Writ of Certiorari to be issued to the Circuit Court of Appeals for the Second Circuit to review the judgment therein affirming a judgment of the Circuit Court against the petitioners. The judgment of the Circuit Court of Appeals is final, except in case the writ is granted.

The case went up to the Circuit Court of Appeals upon a Writ of Error issued to the Circuit Court for the Southern District of New York to review the judgment of that Court entered therein on the 18th day of September, 1907, against the plaintiffs in error, and the orders of said Court, dated the 25th day of June, 1907, and the 31st day of July, 1907, respectively, in pursuance of which said judgment was entered (Record, fols. 1-16).

The action, in which said judgment of the Circuit Court was rendered and said orders made, was brought at common law by defendant in error against plaintiffs in error to recover alleged damages claimed by him to have been sustained by him on contracts for the purchase of two hundred bales of cotton on the floor of the New York Cotton Exchange, which contracts he alleged he employed them to make in their own names, but in his behalf, and they sold out the same without calling on him for margins and without his consent (Record, 20-31).

Plaintiffs in error served their answer to the complaint, and therein deny that they were ever employed by defendant in error to buy any cotton or carried any cotton for him or gave him any credit; but they say that they bought a number of bales of cotton for one Bowman and gave him alone credit and frequently called on him for margin, and on his failure to give them margin, they sold out the cotton at a loss and notified him to pay them the balance and that in that lot of cotton were the two hundred bales claimed by defendant in error in his complaint to have been his (Record, 50-69).

After the service of the answer the counsel for defendant in error upon notice to counsel for plaintiffs in error made a motion before Mr. Justice Holt, sitting in Circuit to hear motions, for an order directing plaintiffs in error to exhibit their books before trial, permit defendant in error, his counsel and agents, to investigate, copy and make abstracts of same, and directing that plaintiffs in error, upon failure to comply with said order, should suffer judgment against them, as in cases of non-suit (Record, 32-71).

This motion was made under § 724 of the U. S. Revised Statutes (Record, 103-104).

Plaintiffs in error resisted said motion, on the grounds that the Court was without jurisdiction to grant an order directing an exhibit of books and papers *before the trial*, and if it had jurisdiction, such an exercise of discretion would not be correct (Record, 73-88; 114-115).

Mr. Justice Holt on June 25, 1907, granted the order asked for, and directed plaintiffs in error to comply therewith by the 15th day of July, 1907, and the order further provided that in the event the plaintiffs in error failed to comply, judgment against them should be entered by default (Record, 89-96).

The 15th day of July, 1907, was at least a year before the case could be reached on the calendar for trial (Record, 114).

With great respect for the learned judge who granted the order, the counsel for plaintiffs in error, informed them that he could not think that § 724 authorized the order, and as he knew of no way to have it reversed until judgment was entered thereon, they felt it to be their duty to customers and their business to have the order

reviewed by the higher courts, and they authorized their counsel so to inform the counsel for defendant in error (Record, 109-111).

On July 16, 1907, counsel for defendant in error made a motion before Mr. Justice Hough for judgment against plaintiffs in error by default, pursuant to Section 724 of the Revised Statutes, and that a writ of inquiry be issued to the marshal to assess the damages (Record, 97-111).

Plaintiffs in error filed affidavits in opposition to said motion contending that the court had not authority to grant judgment or the writ, and that if it did it would be an improper exercise of discretion (Record, 112-117).

On the 31st day of July an order was made granting the motion (Record, 118-123).

The judgment was entered against the plaintiffs in error for $2,275, and $65.45 costs (Record, 136-142).

The plaintiffs in error thereupon sued out the writ of error already mentioned and filed an assignment of errors and the bond required by law (Record, 142-172).

The errors assigned raise the questions whether the Court had authority to enter the judgment and make the orders, and if it had authority, whether its discretion was properly exercised (Record, 142-161).

POINTS.

I.

The decision of the court below in the case at bar construing Sec. 724 of the Revised Statutes of the United States as giving power and authority to Circuit Courts to order a party to an action at law to exhibit his books to the opposite party before the trial, is in conflict with the prior decisions of the Circuit Court of Appeals of the Third Circuit construing said section, and also in conflict with the decisions of Circuit Courts in other circuits construing the same section; and it is in conflict with the plain language of the statute, and is erroneous.

Said Section reads as follows:

> "Sec. 724. *In* the *trial* of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section of the revised statutes is Sec. 15 of an act entitled "An Act to establish the Judicial Courts of the United States," passed September 24, 1789.

1 U. S. Stats., 73, *82.*

On April 7, 1789, at the first session of the senate, Senators Oliver Ellsworth, of Conn., William Paterson, of N. J., William Maclay, of Penn., Caleb Strong, of Mass., Richard Henry Lee, of Va., Richard Bassett, of Del., William Few, of Ga., and Paine Wingate, of N. H. were appointed a committee to bring in a bill for organizing the judiciary of the United States.

1 Annals of Cong. 18.

This was to carry out the terms of the Constitution of the United States, which had been recently adopted by eleven of the original thirteen states, and which had provided in regard to the courts of the United States as follows:

> "Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

U. S. Const., Art. III, Sec. 1.

On June 12, the committee brought in the bill.

1 Annals of Cong., 46;
Journal of Maclay, 74.

And it was discussed there, from time to time, until July 17, when, after being amended, it was passed and sent to the House on July 20th.

1 Annals of Cong., 48, 49, 659;
Journal of Maclay, 85, 88, 89, 91-93, 93-94, 95-96, 97-98, 98-100, 101, 101-102, 102-103, 104-105, 106-109, 117.

It was in the House from July 20, to September 17, when it was passed, with amendments, and reported back to the Senate.

1 Annals of Cong., 782-785, 796-820, 820-834, 888, 892, 894;
Journal of Maclay, 152.

On September 17, the Senate referred the bill to a committee composed of Ellsworth, Butler, of S. C., and Paterson.

1 Annals of Cong., 80.

On September, 19 , the Senate reported to the House that it concured in some amendments and disagreed as to others; and on September 21, the House re-considered the amendments disagreed to by the Senate and adopted them (*sic*).

1 Annals of Cong., 903, 904.

It is seen from the foregoing that Senator Paterson of N. J. was not only a member of the Judiciary Committee; but he was one of the three members appointed by the Senate to consider the bill when sent back by the House with amendments.

On March 4, 1793, William Paterson was commissioned as one of the Associate Justices of this Court; and was assigned to the Middle Circuit, composed of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia.

and he sat with Mr. Justice Peters in the district of Pennsylvania, in April, 1795.

2 Dallas, 331.

And before that court, so composed, in April, 1795, the first reported case involving a construction of Sec. 15 of the Judiciary Act, now Sec. 724 of the Revised Statutes, came up.

Geyger's lessee *v.* Geyger, 2 Dallas, 332.

The statement in the case says:

> "A rule has been obtained by the plaintiff, requiring the defendant to show cause why an order should not be made for the production of certain deeds and papers, *on the trial* of this cause, agreeable to the 15th section of the judicial act; and now, it was moved to make the same absolute.
>
> But, for the *defendant*, it was contended, that the notice of the rule should have been given to the party, and not to his attorney."

The Court said that the act did not designate to whom the notice should be given, the party himself or his attorney; and went on to say:

> "But we will always keep the case under our control, for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason *to postpone the trial*, until a full opportunity has been afforded for the attorney's communicating the rule to the client."

That language shows that there was no thought in the minds of Mr. Justice Paterson and Mr. Jus-

tice Peters that books could be ordered shown to the opposite party at an earlier time than "on the *trial,*" where the party applying could be cross-examined by his opponent, and the relevancy of the documents determined by the court on *evidence* and any other question as to the right of the party to see the books determined in a plenary way.

There was no dream in the minds of the Senators, when the act was passed, that an *inquisition* into the books and affairs of a party to an action at law could be instituted *before the trial.* This is shown by the debate which occurred on a clause in the bill, as first drawn, which *required a defendant, on oath, to disclose his or her knowledge in the cause, etc.,* and which, after debate, was stricken out. Senator Maclay's report of the debate says:

> "We got on to the clause where a *defendant*
> "*was required on oath, to disclose his or her*
> "*knowledge in the cause,* etc., I rose and de-
> "clared that I wished not to take up the time
> "of the committee, as, perhaps, few would
> "think with me (this I said in allusion to
> "what had happened in the committee when
> "I had exerted myself in vain against this
> "clause), but that I could not pass in silence
> "a clause which carried such inquisitorial
> "powers with it, and which was so contrary
> "to the sentiments of my constituents; that
> "extorting evidence from any person was a
> "species of torture, and inconsistent with the
> "spirit of freedom. But perhaps I should
> "say something more pointed when the mat-
> "ter came before the House in Senate. (My
> "reason of acting thus was: I had spoken to
> "Mr. Morris and found he would not second
> "me in it, as Myers Fisher had not taken no-
> "tice of this matter in his letter.) Patter-

"son, however, of the Jerseys, sprang up; "declared he disliked the clause, and having "spoken a while moved to strike it out. I "then rose and declared, since one man was "found in the Senate for striking it out, I "would second him.

"Up now rose Elsworth, and in a most "elaborate harangue supported the clause; "now in chancery, now in common law, and "now common law again, with a chancery "side. He brought forward Judge Black- "stone, and read much out of him. Patter- "son rose in reply, and followed him through "these thorny paths, as I thought, with good "success. He showed justly enough, that "Blackstone cut both ways, and nothing "could be inferred from him but his ridicul- "ing the diversity of practice between chan- "cery practice and that of common law. Els- "worth heard him with apparent composure. "He rose with an air of triumph on Patter- "son's sitting down. 'Now,' said he, 'every- "'thing is said that can possibly be said to "'support this motion. The very most is "'made of it that ingenuity can perform'; "and he entered again the thorny thicket of "law forms, and seemed to batter down all "his antagonist had said by referring all "that was advanced to the forms of law, "with which everything had been shackled "under the British Government. He really "displayed ingenuity in his defense. He "made repeated use of the term 'shackled,' "and how we were now free, and he hoped "we would continue so.

"I determined to have a word or two at "the subject. Said I was happy to hear that "the world was unshackled from the customs "of ancient tyranny; that there was a time "when evidence in criminal cases was ex- "torted from the carcass of the wretched cul- "prit by torture. Happily we were un- "shackled from this, but here was an at-

"tempt to exercise a tyranny of the same "kind over the mind. The conscience was to "be put on the rack; that forcing oaths or "evidence from men, I considered as equally "tyrannical as extorting evidence by tor- "tore; and of consequence had only the dif- "ference between excusable lies and wilful "perjury. I hoped never to see shackles of "this kind imposed. Chancery had been "quoted; common law had been quoted as "practiced in England, but neither would "apply to the present case. The party was "to answer in chancery, but it was to the "judge, and his questions were in writing; "but here, by the clause, he must be examin- "ed in the open court before the bench and "jury and cross-examined and tortured by "all the address and malice of the bar. I "had further to add that, by the Bill of "Rights of the State that I had the honor to "represent, *no person could be compelled to "give evidence against himself;* that I knew "this clause would give offence to my con- "stituents.

"Elsworth rose and admitted that three "new points had been started. He aimed a "reply, but I thought he missed the mark in "every one. The rage of speaking now "seemed to catch the House. Bassett was "up; Read and Strong [were] at it. We sat "till half after three; and an adjournment "was called before the question was put. "Elsworth moved an amendment that the "plaintiff, too, should swear at the request "of the defendant, just before the House ad- "journed.

"*June 30th*—I am still miserably lame with "the rheumatism. Attended at the Hall at "the usual time. The clause with Elsworth's "amendment was taken up. I rose first. "Said that instead of the clause being amend- "ed, I thought it much worse; that it was

"alleged with justice against the clause, as "it stood before, that great opportunities and "temptations to perjury were held out, but "this was setting the door fairly open. The "contest now would be, who would swear "most home to the point. If I was against "it before, I was much more so now. Mr. "Lee rose, and seemed to mistake the mat- "ter. I rose and endeavored to do the busi- "ness justice.

"Up rose Elsworth and threw the common "law back all the way to the wager of law, "which he asserted was still in force. Strong "rose and took the other side in a long har- "angue. He went back to the ancient trial "by battle, which, he said, was yet unre- "pealed, but said repeatedly there was no "such case as the present. Elsworth's tem- "per forsook him. He contradicted Strong "with rudeness; said what the gentleman "asserted was not fact; that defendants were "admitted as witnesses; that all might be "witnesses against themselves. Got Black- "stone; but nothing could be inferred from "Blackstone but such a thing by consent. "Patterson got up, and back he went to the "feudal system. He pointedly denied Els- "worth's position. Bassett rose. Read rose, "and we had to listen to them all. The ques- "tion was, however, put first on Elsworth's "amendment, and was lost; next on striking "out, and it was carried."

Journal of Maclay, 92-94.

If the inquisitorial clause was striken out, the Senate could not have imagined that Sec. 15 of the act would ever be held to empower a court to make a party exhibit what he had written in his books, before there was a plenary hearing on the trial as to relevancy, or whether the party applying had any right to see them.

If any one was competent to know what was in the minds of the legislators who passed section 15 of the Judiciary Act, it was Mr. Justice Paterson.

In Carson's "History of the Supreme Court", it is said of him: "He served as a member of the judiciary committee, and next to Ellsworth, took the most active work of framing the Judiciary Act".

Carson's Hist. of Supreme Ct., 184.

The practice stated in Geyger's lessee *v.* Geyger, *supra,* at which Mr. Justice Patterson presided, remained the practice; and it was not questioned for years, which instance will be noticed later.

In 1806, Bushrod Washington, an Associate Justice of this Court, was attending circuit in the District of Pennsylvania, and a case came before the Court at which he was presiding in which one of the parties had been notified under Section 15 of the Judiciary Act to produce in the trial a will; and the will was handed to the Court; but Mr. Justice Washington would not let it be put in evidence, on the ground that it would not be proper under a bill of discovery.

Hylton *v.* Brown, 1 Wash., C. C. 298.

In 1818, when Associate Justice Washington was again presiding in the District of Pennsylvania, another case came up before him for trial; and the defendant moved for non-suit against the plaintiff on whom he had served only notice to produce at the trial, and apparently not containing a clause that he would move for non-suit in case the papers

were not produced. Mr. Justice Washington, in denying the motion for non-suit, said:

> "In every case, the party claiming the papers must give *evidence* of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or a non-suit, is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a non-suit, or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the Court under this section of the act of Congress."
>
> Bas *v.* Steele, 3 Wash. C. C. 381.

It will be observed that "evidence" is spoken of in that case—not *affidavits*.

In 1821, a rule upon the plaintiff to show cause why he should not produce certain books, papers, and accounts *at the trial* of a case was applied for before Mr. Justice Washington sitting in the same Court; and he said, as to whether the order to show cause should be made absolute:

> "We think it need not be so, but that upon the rule to show cause it may be made *nisi*, leaving the Court at liberty to enforce the rule, unless the plaintiff can show, *at the trial*, good cause for not producing them. If the rule be made absolute at the time when it is argued, the Court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the Court may at once discharge, or make the rule absolute."
>
> Dunham *v.* Riley, 4 Wash. C. C. 126.

It can be seen from that language, that, whether the rule was absolute or *nisi*, the *production* was to be "at the trial."

Thus the practice of having the production only at the trial, as it obtained at the trial presided over by Mr. Justice Paterson, prevailed for thirty-three years after the act was passed; and it does not appear to have been questioned for two years afterwards.

In 1823, however, in a case in the Circuit Court of the District of Columbia the plaintiff, having given notice, moved the Court for an order on the defendant to produce his bankbook and surrendered vouchers, by a certain day *before* the trial; and notwithstanding the Act and the case presided over by Mr. Justice Paterson in 1793 were cited, the Judge, without any reason reported, ordered the defendant to show his bank-book and surrendered vouchers to the plaintiff's counsel before the trial.

Central Bank *v.* Tayloe, 2 Cranch. C. C. 427.

But in 1829 the Circuit Court of the District of Columbia, in another case, held, that plaintiff's counsel had no right to examine defendant's letter books before the trial, to see whether there were not something in them pertinent to the issue.

Triplett *v.* Bank, 3 Cranch. C. C. 646.

In 1835 in that same Court it was held that it was not too late, after the jury is sworn, to call for the books which the Court has ordered to be produced at the trial.

Waller *v.* Stewart, 4 Cranch. C. C. 532.

It would thus appear that it became the practice of that Court to order the books produced *at the trial.*

Not until 1846, does the practice that was followed in the cases before Mr. Justice Paterson, Washington and the later judges of the District of Columbia appear to have been varied from or again questioned—a period of more than half a century after the act was passed—until a case came before Judge Betts, of the District Court of New York, sitting in the Circuit Court, and he held that the plaintiff could be required to show his papers to the defendant *before* the trial. But he so decided under the influence of the rule which permitted it in the State Courts of New York.

Jacque *v.* Collins, 2 Blatch. C. C., 23.

In 1851 in another case before the same judge, the plaintiff asked for an order, upon a notice and affidavit, requiring the defendant to exhibit his books and papers; but he denied the motion upon the ground that they could not be seen under a bill of discovery.

Finch *v.* Rikeman, 2 Blatch., 301.

In 1853, the question whether the section gives the power and authority came before the Circuit Court of the District of Massachusetts, where Benjamin R. Curtis, an Associate Justice of this Court, presided.

Iasagi *v.* Brown, 1 Curtis, 401.

In that case, at p. 402, Mr. Justice Curtis said:

> "It (the Act of Sep. 24, 1789, 1 Stat. at Large, 82, §724), does not enable parties to

compel the production of papers before trial, *but only at the trial,* by making such a case, and obtaining such an order as the act contemplates."

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the Court should not decide finally on the materiality of the paper, except *during the trial;* because it would occupy time unnecessarily, and it might be difficult to decide beforehand, whether a paper was pertinent to the issue; and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty *during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."*

In 1868 another case came up in the District of Massachusetts; and then Nathan Clifford, an Associate Justice of this Court, presided, and he followed the former decision of Mr. Justice Curtis.

Merchants Nat. Bk. *v.* State Bk., 3 Cliff., 201.

In 1879, two cases arose in the District Court of New York, and Choate, District Judge, followed the decision of Judge Betts in 1846 in Jacque *v.* Collins, holding that inspection of books could be had *before* the trial, under the influence of the State practice.

U. S. *v.* Youngs, 10 Blatch., 264.
U. S. *v.* Hutton, *Ib.*, 268.

But in 1885, a case came up before the Circuit Court for the Southern District of New York, at

which Mr. Justice Wallace presided; and the Court, citing the case of Beardsley *v.* Littel, 14 Blatch., 102 (1877), decided by Samuel Blatchford, afterwards an Associate Justice of this Court, held that § 724 did not permit an examination of a party's books *before* trial. And thus he did not follow the above decisions of District Judges Betts and Choate, but those of Associate Justices Paterson, Washington, Curtis and Clifford.

> Colgate *v.* Compagnie Francaise, 23 Fed. R., 82.

In 1887, the question came up before Mr. Justice Lacombe of the Circut Court of the same District, and he followed the decision of Mr. Justice Wallace, and said:

> "This is an application under the United States Revised Statutes, § 724, to require the plaintiff, the official liquidator of Charles Fortin & Co., of Paris, France, to produce for inspection of the defendants, in order to enable them to prepare for trial, all the business books of that firm from the years 1872 to 1878, inclusive. A similar application made in the case of Colgate *v.* Compagnie Francaise, was denied by Judge Wallace (January, 1884), on the ground that the proper practice to obtain such relief in this circuit is by bill of discovery. A statement of the considerations which have induced the adoption of such practice will be found in the report of the same case, upon demurrer to bill of discovery, in 23 Blatch., 86, 23 Fed. Rep., 82.
>
> The motion is therefore denied."

> Guyot *v.* Hilton, 32 Fed. Rep., 743, 744.

Thus the question seemed settled in the Southern District of New York that an inspection of books was not authorized under § 724 *before* the trial.

But in 1899, a case came before District Judge Bradford, of the District of Delaware, sitting in Circuit, and he, reviewing a number of cases, decided that an inspection of books and papers before trial was allowed under § 724. He cited Central Bank *v.* Taylor, *supra,* as the leading authority for his decision; and curiously enough he overlooked the prior cases of Bas. *v.* Steele, *supra,* and Dunham *v.* Riley, *supra,* and he cited the case of U. S. *v.* Youngs, *supra,* and U. S. *v.* Hutton, *supra,* of the District Court of New York, as authorities for his decision, and overlooked the cases of Colgate *v.* Compagnie Francaise, *supra,* and Guyot *v.* Hilton, *supra,* of the Circuit Court of New York, which were authorities the other way. The learned Judge was in error besides in supposing that some of the cases he cited as authorities for his decision were such.

Bloede *v.* Bancroft, 98 Fed. Rep., 175.

In 1902 the above case was cited in a case before Mr. Justice Lacombe, and he was so impressed by the opinion that he considered it exhaustive as showing that the weight of authority was in favor of granting the motion to see the books of the plaintiff, and so he followed that authority and granted the motion.

Gray *v.* Schneider, 119 Fed. Rep., 474.

But in the meantime, viz., in 1896, a case had come up in the Circuit Court of the District of New Jersey, and Green, District Judge, sitting in that court, said of § 724:

> "Within the terms of this statute alone must be found, then, the right of the plaintiff to ask for and receive the discovery it seeks; * * *. But by the very words of the statute the exercise of the power vested in federal courts to require production of such books or writings is limited to causing such production to be made at the trial. The words are not, broadly, 'in any action at law at any time' the court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is, then, at that particular time—at the trial, and at no other time—that the court may, in its discretion, order books to be produced; and that this is the proper construction of this statute is settled by many well-considered cases."

United States *v.* Nat. Lead Co., 75 Fed. Rep., 94, *95*.

While the learned Judge quotes the Statute as reading "on the trial of any action", when it reads "in the trial of actions", that only shows that he considered "in" to be equivalent to "on"; and in that, it is submitted that he was right.

And in 1894, a case came up in the Circuit Court of the District of Connecticut, Townsend, Circuit Judge, sitting, and it was considered that the production of the books were to be at the trial.

Kirkpatrick *v.* Pope, 61 Fed. Rep., 46, *47, 49*.

Thus it will be seen that the learned Judge in Gray *v.* Schneider, *supra,* fell into error in considering that the weight of authority, as claimed in Bloede *v.* Bancroft, *supra,* was in favor of motions to see books *before* trial, and in giving up his own opinion as expressed in Guyot *v.* Hilton, *supra.* While the Delaware case is well reasoned, it has been seen not to be exhaustive; and, with great respect, it is submitted that it is not sound; and its authority has been overruled by the Circuit Court of Appeals of the Third Circuit.

In 1907, the case of Bloede *v.* Bancroft was considered in a case that came up before the Circuit Court of Appeals, and that court pointed out omissions and errors in it, and after considering many authorities said:

> "We conclude, therefore, that section 724 does not confer the power to require a party to produce books before trial".
>
> Cassatt *v.* Mitchell C. & C. Co., 150 Fed. Rep., 32, 44.

Two cases that were heard at the same time involving the construction of §724 were brought up to this Court by *certiorari* and reversed, but on the ground that the order was only interlocutory, and not on the ground that the section had been misconstrued (207 U. S., 181, 187). The case of Cassatt *v.* Mitchell, *supra,* seems not to have been carried up and remains the law in the Third Circuit. And that is the law in that Circuit now, as is seen in another case.

> Penn. R. R. Co. *v.* Int. C. M. Co., 156 Fed. Rep., 765.

The attention of the Circuit Court of Appeals on the hearing of the case at bar was called to those two cases decided by the Circuit Court of Appeals and they were considered; but the learned Court of the Second Circuit declined to follow them, and said:

> "The question whether under Sec. 724 a party could be required to produce his books and papers before the trial is one which has been frequently considered; the decisions rendered in different districts are not harmonious. * * * It is unfortunate, perhaps, that there should be diversity in the practice in different circuits, but the remedy for that would be an application for *certiorari* to the Supreme Court."

The petitioners apply to this Court for the writ of certiorari; and they submit that the learned Court has erred in its judgment affirming the judgment below.

In addition to what has been said in the cases cited from the Circuit Court of Appeals of the Third Circuit and from the cases in the other Circuits, and in the debate that occurred in the Senate when Section 15 of the Judiciary Act was passed, it is submitted that the language of that section, now Section 724, is plain to the effect that books and papers, in actions at law, are not to be shown to the opposite party involuntarily before the trial. The section does not say "in actions at law." It says: "in *the trial of* actions at law." If the eminent body, much learned in the law and well grounded in the basic principles of our government, had intended that books and papers should be shown to the opposite party *before* the trial,

they would not have used the extra words "the trial of," but would have simply said "in actions at law." The several lawyers, who dealt with the bill, certainly knew the force and meaning of words; and they should not be held to have used three surplus words unnecessarily, or the word "in" for "before"

Again. there were amendments to the bill; and, as one clause stricken out provided for an *inquisition*, it is possible and perhaps more than possible, that the three words, in "the trial of," were inserted by way of amendment of the section to put it as nearly in accord as possible with the tenor of the bill, after the obnoxious clause was stricken out.

Moreover, it was going far enough to allow questions of relevancy and the right of a party to see books to be decided *in the trial*, without pleadings on those points, the same as they would be decided in proceedings in chancery on a bill of discovery. In a bill of discovery the proceedings are plenary and heard upon pleadings and proofs where each side can cross-examine. In the trial of an action at law, the section dispenses with pleadings; but it does not dispense with the right to cross-examine. It was intended that the hearing should be in the place of a plenary suit. No other legislative body had before granted such power to a common law court.

1 Thompson on Trials, §731.

Not one word is said in the Statute about the hearing as to right to see and relevancy being on *affidavit*. It says "upon notice." Of course, as right and relevancy were to be decided in the trial.

no affidavit was necessary; for the Court would hear the "evidence."

It is submitted that only in connection with the other testimony in a case can the Court know what right the applicant has to see books and papers and the relevancy. There is no fairness vouchsafed in a hearing of these questions on affidavits. There is no chance to see and cross-examine the affiants, and it gives an undue advantage to those who are willing to swear anything when there is no cross-examination. Besides, the Judges cannot know by affidavits what are the real facts involved in the case and these affidavit contests are a burden upon them and a nuisance to lawyers. Besides, it is possible for a party to get an order to inspect his opponents' books *before the trial,* without making any affidavit himself under the construction given §724 by the learned Court below. Indeed, it was done in the case at bar. Winn made no affidavit at all! And yet he got an order giving him or his lawyer leave to see and inspect petitioner's books for two years and copy the same—whether the accounts were in his name or that of P. G. Bowman, or that of the Sumter Bank, two parties not made parties to the action!

The fact that the Statute provides that the party failing to show books shall suffer "nonsuit" or "default," as the case may be, shows that it was to be at the trial; for, as pointed out in Cassatt *v.* Mitchell, *supra,* that was the only time when a nonsuit or default could be granted in those days.

The clause "in cases and under circumstances where they might be compelled to produce by the ordinary rules of proceedings in chancery," contained in the section, does not refer to *time.* The clause says "in *cases* and circumstances *where.*"

That means that if the books and papers were relevant in chancery, they would be in the trial of an action at law. The case of Hylton *v.* Brown, *supra,* illustrates the value of that phrase in the section.

The construction placed upon §724 by the Court below would make it possible in a case pending in New York to require a party living in California to produce his books in New York *before* the trial, and also at the trial. Or, if his adversary concluded not to use them after seeing them, it might nevertheless be necessary for the party owning the books to bring them to the trial. Such a possibility shows that the authors of the Act never contemplated such a construction being placed on it.

The Act should be construed under the lights then existing, as was said by Mr. Justice Wallace in a case already cited:

> "There can be no ebb and flow of jurisdiction dependent upon external changes."
>
> Colgate *v.* Compagnie Francaise, *supra.*

The petitioners have a right to keep their books and papers a secret under the common law and the Constitution, and §724 should be construed strictly, like an attachment statute.

> Entrich *v.* Carrington, 19 Howell St. Tr. 1029.
>
> Boyd *v.* United States, 116 U. S., 616, *626-27.*

Congress having provided for discovery, there is no other authority.

> Ex parte Fisk, 113 U. S. 713.
>
> Amy *v.* Watertown, 130 U. S. 301.

II.

The motion for a Writ of Certiorari should be granted.

Forsyth *v.* Hammond, 166 U. S. 506, *514.*

Webster C. Co. *v.* Cassatt, 205 U. S., 547.

Respectfully submitted,

JOHN R. ABNEY,
Counsel for Petitioners.

No. [redacted]

The Supreme Court of the United States,

OCTOBER TERM, 1908.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,

Petitioners,

against

DAVID J. WINN,

Respondent.

Brief in Answer to Petition for Writ of Certiorari.

JOHN W. BOOTHBY,
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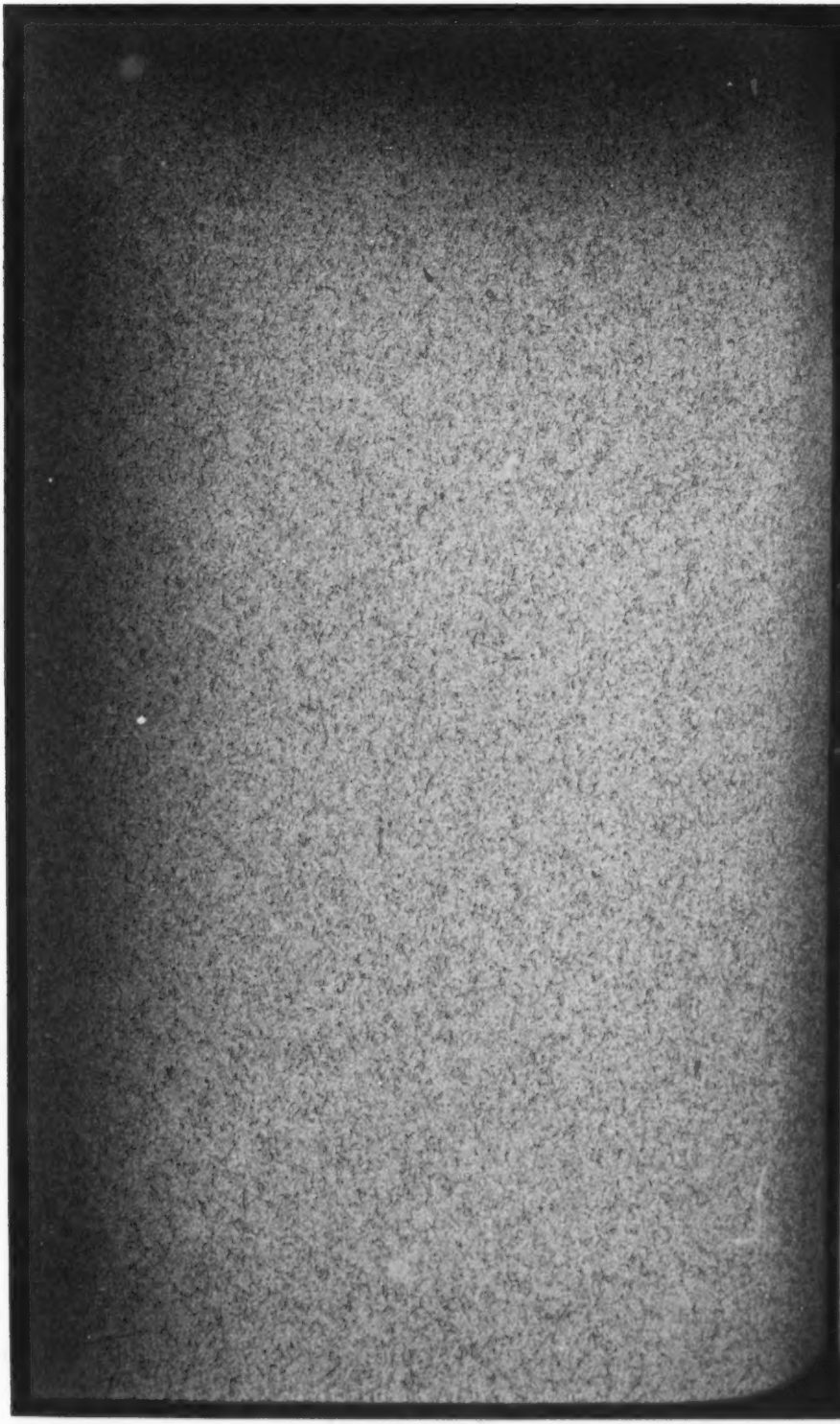

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Brief in Answer to Petition for Writ of Certiorari.

The petition for a writ of certiorari in this case is based solely upon the claim that the Circuit Court had no *power or authority* under Section 724 of the Revised Statutes to make the order of June 25th, 1907, for a discovery of books, &c. (pp. 30, 31 and 32 of the Record), or to make the order of July 21st, 1907, declaring the plaintiffs to be in default for not obeying the order of June 25th, 1907, and authorizing judgment to be entered against them by default (pp. 40-41), or to enter judgment against the petitioners in accordance with that order (fols. 30 and 31 of the Petition).

There is no question raised but that, if the Court *had* that power and authority, and exercised its dis-

cretion to make those orders, that discretion was properly exercised.

All of the facts necessary to sustain the order, if the Court had power and authority to make it, were found by the Court below, and will not be reviewed here. In other words, the Court below found that it was established that the books and writings ordered to be produced, were in the possession or power of the defendants in the case, the petitioners here, and that they contained "evidence pertinent to the issue," and that the record presented a case and circumstances where the petitioners might be compelled to produce the books and writings ordered to be produced "by the ordinary rules of proceeding in chancery," as provided by Section 724 of the Revised Statutes.

Nor is any question raised on the record that if the Court had the power and authority under Section 724 to order the production of these books before trial, the plaintiff, the respondent here, did not pursue the *right practice* to obtain their production, and to recover the judgment on the failure of the petitioners to obey the order for their production.

POINTS.

I.

Section 724 of the Revised Statutes authorizes and empowers the Circuit Court to make an order for the production of books and writings before the trial of the action, as well as on the trial, upon motion, where facts are presented to it by affidavit or otherwise showing that such books and writings are in the possession or power of the party from whom the same are required, and that they contain evidence pertinent to the issue, and the orders and judgment complained of were therefore valid.

Section 724 of the Revised Statutes reads as follows:

> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

It is a substantial re-enactment of Section 15 of an act entitled "An Act to Establish the Judicial Courts of the United States," passed September 24th, 1789. That section was enacted, among other things, for the purpose of providing a sum-

mary way in which a party to an action at law might procure the production of books or writings in the possession or power of the other party, and not be compelled to resort to the cumbersome method provided by a bill of discovery. And it expressly provided that this summary method could only be resorted to "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

The method by which such production of books and papers could be compelled "by the ordinary rules of proceeding in chancery" was by bill of discovery, and by that method, production of such books and papers could be, and had to be compelled before the trial of an action at law.

Story on Equity Jurisprudence, Section 1485.

2 Daniel's Chancery Practice, 1556

As we have said, the 15th Section of the Judiciary Act was intended to provide a summary way to obtain the production of books and writings, in the furtherance of justice.

Such summary methods by which a party to an action at law can obtain a discovery and inspection of books and papers in the possession of the other party, containing evidence pertinent to the issue, *before the trial*, have in most of the States, and in England, been provided by statute, and furnish the common method of procedure in such cases, and if it be that Section 724 of the Revised Statutes above referred to does not authorize and empower the United States Courts to grant such discovery and inspection, those Courts are without a power exercised by most of the State Courts, and by the English Courts.

In New York, Sections 803 to 808 of the Code of Civil Procedure provide such a summary method, and in England it is provided by the Common Law Procedure Act, 17 and 18 Victoria, Chapter 125, Section 50, and in that statute, as in the New York statute, and in the statutes of most of the States, the application is made by *affidavit*, showing the possession of the books by the other party, and their pertinence to the issue.

And the vast weight of authority in the United State Courts as to the power of the Court to grant an inspection under Section 724, *before the trial*, is in favor of such power, so that such power is sustained by principle as well as by authority.

We have carefully examined the cases cited by the petitioners in their brief on this application, with the following results.

GEYGER'S LESSEE vs. GEYGER, 2 DALLAS, 332.

The question whether the Court could, under Section 15 of the Judiciary Act, order the production of books or writings *before* the trial, or *at* the trial, was not raised, discussed or considered in this case. The *motion was* that the books, etc., be produced "*at the trial*," and the only point raised or decided was that notice to the attorney was sufficient notice. The Court incidentally remarked that it would see that the client had plenty of time to produce the books, and to that end would, if necessary, adjourn the trial.

LESSEE OF HILTON vs. BROWN, 1 WASH. C. C., 298.

This was an action of ejectment. On the trial, before the impaneling of the jury, the defendant

read a notice to plaintiff's counsel to produce *at the trial* a Will of one Griswold who, by deed, had leased the land to the plaintiff. It was objected that the application was premature, and could not be made except during the trial, after a jury had been impaneled. The Court denied the motion, but on exactly what grounds does not appear, except that the Court had no proof before it that the Will was "pertinent to the issue," and only when that proof was furnished, could it tell whether the Will ought to be produced or not. There was no affidavit on the motion showing that it was pertinent. The jury was then impaneled, and the plaintiff offered evidence of his title, and that it came through Griswold. The defendant then went on with his case, and renewed his motion that the plaintiff produce the Will, and the plaintiff handed it to the Court, but insisted that it was not a case in which under the Act he was compelled to produce the Will, as it had not been shown that it was "evidence pertinent to the issue," and that he could not have been compelled to produce it "by the ordinary rules of proceeding in chancery." The Court, WASHINGTON, J., said:

> "The remedy provided by the Act of Congress is merely cumulative; *and to save the time and expense of a bill of discovery*, it enables the court to do in a *summary way* what they might do if a *bill of discovery were filed* on the equity side of the court, and no more."

He then proceeded to show that the discovery of such a paper could *not have been obtained* by such a bill, because it could only tend to defeat the plaintiff's title, and not to prove title in the defendant. The rest of the case is on other points.

The case is barren, as we read it, of any adjudication, or even opinion, as to the construction of the 15th section of the Judiciary Act, as to whether a discovery can be ordered before the trial on motion and affidavit, or by petition, showing that the document of which discovery was sought was "pertinent to the issue."

BAS vs. STEELE, 3 WASHINGTON C. C., 381.

This was an action for damages against the Collector of the Port of Philadelphia for refusing to clear a Spanish vessel. After the suit was commenced, but before the trial, the defendant's counsel gave notice to the plaintiffs to produce certain documents and papers *on the trial*, and *at the trial* called for them. Counsel for the plaintiffs stated that the plaintiffs did not have the documents and papers, and that they were not in existence, except a log book of the vessel, which was on the vessel at Havana, and some other papers which seem to have been produced and put in evidence. Thereupon the defendant's counsel moved for a nonsuit on several grounds, one of which was that the 15th section of the Judiciary Act, now Section 724 of the Revised Statutes, gave him that right. The plaintiffs' counsel opposed the motion on several grounds, among which was that the provisions of that Act "applied only where a *motion had been made* to the Court for an order on the party to produce the papers, followed by a notice thereof, and some evidence that the party called upon for them had them in his possession, and that they were pertinent to the issue" (p. 385).

The Court denied the motion on all the grounds urged, and in respect to the ground of the non-

production of the papers, he rested his decision on the following reasons, as will be seen from the opinion, pages 386, 387: (1) It was not shown that the party called on for the papers had them, or that they were pertinent to the issue. (2) That the uncontradicted evidence was that the plaintiff had not the papers, and that they never existed. (3) That no notice had been given to the plaintiff of any motion or application for a nonsuit, as a consequence of his not producing the papers.

The question as to whether the Court *had the power* to order the production of the papers *before* or *at* the trial was not raised or discussed at all. As we have pointed out, the notice was to produce them *at the trial.* The case has no bearing on the question under discussion in the case at bar.

DUNHAM vs. RILEY, 4 WASH. C. C., 126.

This was an application or motion for a rule or order to direct the plaintiff to produce certain books and papers *at the trial.* It was made in advance of the trial on notice. The Court held that it was properly so made, and that an order in advance of the trial was necessary, and the only other question considered was whether the order should be absolute in the first instance, or *nisi.* The Court said it *might* be *nisi*, and so made it. It was not held, or even intimated that the order might not, in the discretion of the Court, and on a proper showing be made absolute for the production of the books in the first instance. The case, however, does not bear in any way on the question as to whether the Court had the power to order the production of books, etc., for inspection before the trial. The point was not at issue, and was not considered or decided.

CENTRAL BANK vs. TAYLOE, 2 CRANCH C. C., 427.

(Decided 1823.)

This was an action of assumpsit on open account, and for moneys lent and advanced. This is the *first case* in the United States Courts, which is reported, in which a motion was made *before the trial* for the production of books and papers for inspection *before the trial,* under Section 15 of the Judiciary Act of 1879 (1 Stat. at Large, 73). It brought the question here at issue squarely up for judicial determination, and the Court decided squarely that under that Act an order could be made for the production of books *before the trial,* and made such an order directing the production of the books and papers on a day before the trial, "for the inspection of plaintiff's counsel."

This is not only the first case in which the point now at issue was decided, but it is a leading and well considered case.

TRIPLETT AND NEALE vs. BANK OF WASHINGTON, 3 CRANCH, 646.

The plaintiffs gave notice to the defendant in advance of the trial to produce "*at the trial* certain letter books to be used in evidence." The Court considered the call or notice too general, and that it had not been shown to the satisfaction of the Court "that the books called or contained *evidence pertinent to the issue.*"

It is stated that Mr. Neale, apparently one of the plaintiffs who had given the notice, orally claimed in Court that he had a right to look at the books before the trial "to see whether there was not something in them pertinent to the issue." The

Court thought not, but that was *not* the order asked for. The expression of the opinion of the Court went no further than that it was considered that the applicant for an order to produce books and papers, whether at or before the trial, must satisfy the Court that they contain evidence pertinent to the issue, as a prerequisite to the order.

The plaintiff then gave a fuller notice to produce the books, etc., "*at the trial,*" and moved for an order for such production. It was objected that the notice was still too general, and that there was nothing before the Court to show that there were any such books, or that they contained anything pertinent to the issue. The Court refused to make the order *on that ground*, and on that ground only. It was not a question of the jurisdiction or power of the Court to make any order for such production either *at* or *before* the trial. It was merely a decision that on the facts before it, the Court was of the opinion that enough had not been shown to satisfy the Court that it should exercise its discretion and make an order for the production of the books at the trial. The case is not at all an adjudication contrary to that in Central Bank vs. Tayloe, *supra*. It was made by the same Court, consisting of the same Judges as decided the case of the Central Bank against Tayloe. If they had intended to overrule their own decision in that case, they would certainly have referred to it, and said so.

WALKER vs. STEWART, 4 CRANCH C. C., 532.

This case has no bearing upon the question at issue in the case at bar. The defendant had obtained an order for the plaintiff to produce his books *upon the trial*. Upon the trial he called for

the books, and the plaintiff's counsel claimed it was too late after the jury was sworn. The Court thought that a motion for a *non pros.* for non-production of the books was not too late, if made on the trial, after the book was in Court and in the possession of the plaintiff's counsel, who refused to produce it. It was then produced. There was then raised the question as to whether if the defendant's counsel inspected the book, that made it competent evidence for the plaintiff. The Court thought it did, and thereupon the counsel declined to inspect it.

JACQUES vs. COLLINS, 2 BLATCH., C. C., 23.

(Decided in 1846, BETTS, J.)

This is the *second case* reported where the question was squarely decided as to whether the Court could make an order under Section 15 of the Judiciary Act for the production of books and papers for the inspection of the opposing party *before the trial*, and also as to what was necessary to justify the Court to make such an order. It was argued by very able and distinguished counsel on both sides. The defendants presented a *petition* to the Court on notice to the other side, for an order directing the plaintiffs to deposit certain papers, described in the petition, with the Clerk of the Court, for the inspection of the defendants and their counsel *before the trial*, so as to enable them to *"prepare for trial."*

The motion was strongly opposed, but the Court made the order prayed for, and pointed out very clearly and explicitly what must be shown to the Court *by the petition* to justify the order. It thus appears that the proper way to present to the Court the fact that the party called upon for the books

has the books called for, and that they contain evidence pertinent to the issue, is by *petition* or *affidavit*, and not by oral evidence, as the petitioners' brief in the case at bar seems to claim.

FINCH vs. RIKEMAN, 2 BLATCH., 301.

Action for damages for infringement of a patent. The plaintiff moved on an *affidavit* that defendants be ordered to produce their books of account, and that the plaintiff have leave to take copies of such parts thereof as referred to the matters set forth in the affidavit, and that on their failure to produce the books, etc., pursuant to the order, final judgment be rendered against them in the action. The defendant, *by affidavit*, denied the infringement and alleged that they kept no separate entry or account as to any particular job, but that all the accounts were in one book.

This motion was made before Judge BETTS, the same Judge who decided Jacques vs. Collins, *supra*. He denied the motion on the following grounds: (1) That Section 15 of the Judiciary Act only gave power to the Court to direct the production of books and papers in cases and under circumstances in which a Court of chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents (p. 302). (2) That the "effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequences will be *to subject the defendants to a penalty* of three times the amount of those damages under Section 14 of the Act of July 4th, 1836, 5 U. S. Stat. at Large, 123," and that *therefore* a Court of equity would not allow a bill of discovery in such a case, "unless the bill relinquishes all

claims to the penalty which may be superinduced by the production and exhibition of the books, and *for that cause* the motion must be denied" (p. 304).

Thus it will be seen that the Court did not deny the motion on the ground that it had no power to order a production of the books before the trial, but because the case made out by the affidavit of the moving party was not a "case and under circumstances in which a Court of chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents."

Thus it appears that Judge BETTS in this case did not overrule his decision in Jacques vs. Collins, *supra*. He put his decision on the ground that the disclosure asked might subject the party moved against to *penalties and forfeitures*, and showed that a Court of chancery would not compel a party to make such a disclosure by bill of discovery.

IASIGI vs. BROWN, 1 CURTIS, 401.

There was a motion made in this case on an *affidavit*, to compel the production and delivery to the Clerk of the Court of certain papers alleged to be material on the trial of an action at law. The existence of the papers and their materiality was not denied. The motion was resisted "*on the ground that the party moving had already filed a bill of discovery*," covering substantially the same facts and documents; and "it was urged that having resorted to *this* mode of discovery, the party must read the answer, and could not have the benefit of the order under the Act of Congress."

Thus it will be seen that the question of the power of the Court to make an order for the dis-

covery of the books and documents before the trial, *was not raised by counsel on either side*, and the lack of such power was *not urged* as a ground for the denial of the motion. The Court, however, on the hearing, made the following remark:

> "It (*i. e.*, the Act) does not enable parties to compel the production of papers before the trial, but only at the trial, by making such a case and obtaining such an order as the Act contemplates."

And the Court ordered the production of the papers at the trial, or that the parties show cause on the trial why the same were not produced.

The Court cited no cases in support of his dictum, and seems from the opinion not to have given the matter much consideration. He overruled the only point made by counsel in opposition to the motion, and held that the fact that the moving party had filed a bill of discovery was not a bar to making this motion, or to his getting the relief he sought.

MERCHANTS NATIONAL BANK vs. STATE NATIONAL BANK, 3 CLIFFORD, 205.

In this case a motion was made by the plaintiff to compel the defendant to produce certain documents or writings in its possession. It does not appear whether the motion was to compel the production of the books, etc., *before the trial* or *at the trial*. The motion was denied, but not on the ground that the Court had no power, but on the ground that the Court was not satisfied that a satisfactory case had been made out in the moving papers. The Court said that:

> "The evidence to show that the case is one

> within the conditions of the provision is not entirely satisfactory. Were there no other objections to the granting of this motion, we should be constrained to deny it, but there is another even more decisive than those already suggested."

The Court then pointed out that it appeared that the books were in the custody of the bank officers, and would, no doubt, be produced under a *subpoena duces tecum*, but that if that failed to bring them, the Court would find some adequate remedy for the moving party.

In this case the Court does not express a positive opinion that it could not, in a proper case, and on a proper showing, order the production of the books before trial. It does not refer to the Iasigi case, or cite any authority. The Court said:

> "Production before trial is *perhaps* not contemplated by the words of the provision, nor is it generally necessary" (p. 204).

U. S. vs. YOUNG, 10 BENEDICT, 264.
(Southern Dist of N. Y., CHOATE, J.)

This was an action to recover a balance of duties on certain imported sugars. A motion was made by the defendant to compel the plaintiff to produce official returns of the weights of the sugars *before the trial.* The motion was made on *affidavits showing that the production and inspection was necessary to enable the defendants to prepare for trial.* Judge CHOATE granted the motion, and squarely held that the Court had power under Section 724 to order the production of papers for the inspection of the opposing party and their counsel *before the trial;* citing Central Bank vs. Tayloe, 2 Cranch, 427, *supra*, and Jacques vs. Col-

lins, 2 Blatch., 23, *supra*. The Court also referred to the case of Iasigi vs. Brown, *supra*, showing that he had it before him when he made the decision.

UNITED STATES vs. HUTTON, 10 BENEDICT, 268.

(Decided in 1879, CHOATE, J.)

In this case too, Judge CHOATE, in the Southern District of New York, held that all books and writings might be ordered to be produced under Section 724 of the Revised Statutes before the trial, it being shown that they were pertinent to the issue. The Court said:

> "But this statute seems clearly to limit the remedy to cases where the *issue is joined*, one test of the statute to a right to a production of the books and papers being that they contain 'evidence pertinent to the issue' " (p. 278).

The Court then points out that the statute does not take away the right to relief by bill of discovery, and cites Beardsley vs. Littell, 14 Blatch., 405.

BEARDSLEY vs. LITTELL, 14 BLATCH., 405.

In this case, Section 724, under consideration here, was not in question, and was not even mentioned or referred to. The motion was for an *examination of the defendants* before trial under Sections 390 and 391 of the New York Code of Procedure, and Section 914 of the United States Revised Statutes, and it was held that Section 914 did not make it possible to *examine a party* before trial in the United States Courts, and that such

an examination was forbidden by Section 861 of the Revised Statutes.

COLGATE vs. COMPAGNIE FRANCAISE, 23 FED. REP., 82.

No motion was made in that case for a production of the books and papers *before* or *at* the trial. A bill of discovery was filed on the equity side of the Court, and the case came up on a demurrer to the bill; one of the grounds of the demurrer being that the Court should refuse to entertain the bill because under Sections 724 and 858 of the Revised Statutes, and the existing practice in Courts of law, discovery no longer was necessary, but that the plaintiff could obtain in a suit at law all necessary evidence by an examination of the officers of the defendant, and by obtaining an inspection of the books and writings containing pertinent evidence. The Court overruled the demurrer, *but did not in any way pass upon the question at issue here*, or upon the construction and application of Section 724 of the Revised Statutes. The question as to whether the books and papers could be ordered to be produced before trial or at the trial was *not raised or considered* in the case. All the Court did say was that by Sections 724, 858 and 914 of the Revised Statutes, a party could not

> "obtain the *testimony of the defendant* before the trial in an action pending in this court, although he could do so in the state courts, because Section 861 of the Revised Statutes, as construed in Beardsley vs. Littell, 14 Blatch., 102, requires *such testimony*, unless taken *de bene esse* or by commission, to be taken in the presence of the court and jury at the trial" (p. 83).

There was no question of books and papers in that case. It was a question of obtaining the *testimony of the opposite party* by answers to the bill of discovery.

GUYOT vs. HILTON, 32 FED. REP., 743.

In that case there was an application under Section 724 for the production of books for inspection before trial. It was denied on the ground that the proper practice to obtain such relief in that circuit was by bill of discovery. Subsequent decisions, both in the Supreme Court and in the Circuit Court, seem to have held otherwise. In *ex parte* Boyd, 105 U. S., 647, the Court said:

> "A bill in equity to compel disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in the pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds or other documents, important as instruments of evidence, *when the court of law in which the* suit is pending *is authorized by summary proceedings* to enforce the *same right.*"

And this seems to have been the view of the same Court in Union Pacific Ry. Co. vs. Botsford, 141 U. S., 250.

It was said by the Circuit Court of Appeals in the Fourth Circuit in the case of Safford vs. Ensign Mfg. Co., 120 Fed. Rep., 480, 482:

> "It has been held that in ordinary cases a pure bill of discovery can no longer be main-

> tained in the equity courts of the United States because under Section 724 of the Revst. Statutes it is *no longer generally needed.*"

It was said by Justice BREWER, in Preston vs. Smith, 26 Fed. Rep., 884, 889:

> "Finally it is claimed that the bill must be sustained because a discovery is sought. I do not understand that a bill can be sustained solely for the purpose of discovery; at least, that is the genaral rule. Indeed, bills of discovery are *rarely, of late, resorted to.* They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of 'innocuous desuetude.'"

And in Brown vs. McDonald, 133 Fed. Rep., 897, it was held by the Circuit Court of Appeals in the Third Circuit, that Sections 724 and 885 of the Revised Statutes

> "have removed *the necessity* of resorting to bills of discovery in ordinary cases, but we are not willing to hold that the statutes have altogether abolished the equitable remedy by bill of discovery."

So that the ground on which Judge LACOMBE, in Guyot vs. Hilton, *supra*, denied the motion, has since been decided not to be tenable.

BLOEDE vs. BANCROFT, 98 FED. REP., 175.

This is the most carefully considered case in the books, on the *exact question here at issue.* It came up in the Circuit Court in the District of Delaware, Judge BRADFORD writing the opinion. That opinion is exhaustive. It goes into the whole history of this section, and considers all of the cases referred to by the petitioners here, and many others, and shows that both on principle and authority the

power of the Court here contended for by the respondent and exercised by the Court below exists under Section 724 of the Revised Statutes. We cannot present the question any more clearly than it is presented by Judge BRADFORD in that case. In the course of his opinion, he says:

> "It is, and was, at and prior to the passage of the Judiciary Act, within the settled jurisdiction of chancery, and a usual practice, to order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein, and desiring to use the same in *preparing himself for trial.* It must be assumed that Congress was aware that the 'circumstances' under which production might be compelled in chancery, embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writngs *before the trial* of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the courts in actions at law to order production for inspection *after issue joined,* in all cases and under all circumstances where it might have been ordered in chancery, in aid of parties to such action, and that this court, sitting as a court of law, can in such actions under pain of nonsuit or default, enforce production of books or writings to the same extent, and for the same purposes as when sitting as a court of equity and compelling production in aid of such action" (p. 184).

The Court then goes on to show that the construction of the section that books and writings could only be produced at the trial would

> "be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection, and calculated to

embarrass and defeat the due administration of justice" (p. 185).

GRAY vs. SCHNEIDER, 119 FED. REP., 474.

There was just such a motion as the one made in the case at bar, made in that case before Judge LACOMBE, in the Southern District of New York, and the motion was granted on the authority of the Bloede case, *supra.*

UNITED STATES vs. NATIONAL LEAD CO., 75 FED. REP., 94.

This was a case in the Circuit Court for the District of New Jersey, and the motion for the discovery was made under a section of the State statute as well as under Section 724 of the Revised Statutes. The learned Judge who decided it, seems to have misunderstood the words of the section, using, both in the quotation of the section, and in his opinion elsewhere, the words "on the trial of actions at law," instead of "in the trial of actions at law," and seems to have laid a good deal of weight upon the words "on the trial." He denied the motion, but not solely, and not apparently principally, upon the ground of want of power of the Court to make the order asked for. The other, and seemingly principal, ground for denying the motion, was that

> "the discovery sought may indeed have no immediate tendency to incriminate the defendant, but that does not militate against the force of the rule that the defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to any accusation of that nature" (p. 97).

The motion was denied, therefore, apparently

principally, on the ground that it would tend to convict the party of a crime.

KIRKPATRICK vs. POPE, 61 FED., 46.

This case came up in the Circuit Court for the District of Connecticut. A motion was made to compel the defendant to produce its books and records *at the trial of the action,* and *not* before the trial, and the motion was granted. The case does not pretend to decide, or even to consider, whether the Court had the right to order the production of books and papers *before the trial*, and the case, in no view, is any authority upon that question.

CASSATT vs. MITCHEL COAL & COKE CO., 150 FED. REP., 32.

This is the only case considered by a Circuit Court of Appeals, referred to in the petitioners' brief, where it has been held that Section 724 of the Revised Statutes did not confer power on the Court to require a party to produce books before trial; and in this case BUFFINGTON, Circuit Judge, dissented.

The action was brought by the Mitchel Coal & Coke Co. against the Pennsylvania R. R. Co., a corporation, to recover damages for its alleged violations of Sections 2 and 3 of the Interstate Commerce Act. The defendant filed a plea of not guilty; and, after issue was joined, and before the trial of the action, the plaintiff filed in the Circuit Court a petition, setting forth that the defendant and Alexander J. Cassatt, President, and John B. Thayer, one of the Vice-Presidents, and ten other specifically named officers and employees of the defendant, had in their possession and power certain books and papers containing evidence pertin-

ent to the issue, and asking for an order requiring the defendant and said officers and employees to produce the said books and papers at the trial, "and also for the inspection of the plaintiff's representatives before trial," under Section 724.

The Circuit Court, after granting an order to show cause, ordered that Cassatt, Thayer and the other officers and employees of the defendant produce on the trial the papers described in the petition, and also that they produce them *before trial* at a specified time and place, for the inspection of the plaintiff, with leave to make copies thereof. Thereupon a writ of error was sued out by the *individual defendants only*, to review that order.

The bulk of the opinion of the Circuit Court of Appeals is taken up with a consideration of the question as to whether that order was "a final decision"; or, in other words, a final decree or final judgment, so that the individual defendants might review it by a writ of error in the Circuit Court of Appeals; and it was held that it was such a final decision, and was reviewable by writ of error.

The Court also was of the opinion that under Section 724 of the Revised Statutes, the Circuit Court had no power to order the production of the books for inspection before the trial. It is to be observed that in this case no order was made directing the "party" defendant in this action (*i. e.*, the Pennsylvania R. R. Co.) to produce any books.

At the same time that the order was made in this action, there seems to have been a like order made in two other actions against the same defendant, the one brought by the Pennsylvania Coal & Coke Co., and the other by the Webster Coal & Coke Co., in which the parties were represented by the same counsel on each side; and that writs of error were

sued out by the same individuals to review both of those orders in the Circuit Court of Appeals, at the same term; and in both of which cases a like decision was made by the Circuit Court of Appeals (150 Fed. Rep., 48), without separate opinions, but upon the opinion in the case of Cassatt vs. The Mitchel Coal & Coke Co., *supra.*

A writ of certiorari was granted by the United States Supreme Court to review the orders in the two latter cases, and on that review the judgments of the Circuit Court of Appeals in the Third Circuit were reversed by this Court, upon the ground that the individual defendants against whom the order was made were not "parties" to the actions, and that the order against them was purely interlocutory, and not a final decision which could be reviewed by the Circuit Court of Appeals on a writ of error (207 U. S., 181-187). So that it was there determined by this Court, that the Circuit Court of Appeals had no jurisdiction to review the orders in any of those cases; and, therefore, whatever the opinion of the Circuit Court of Appeals in any of those cases contained as to the *power* of the Court to order production of books and papers before the trial, under Section 724, was not an authoritative decision of the question, and was nothing more than an expression of opinion in a case not properly before it, and upon which it had no jurisdiction to pass.

That leaves the decision of the Circuit Court of Appeals in the Second Circuit in the case at bar as the *only decision of a Circuit Court of Appeals upon the subject here at issue.* But if the Circuit Court of Appeals in the Third Circuit had had the right to review the orders in those cases, its reasoning in its opinion on this subject was, we think,

unsound. The learned Judge who wrote the opinion refers on page 42, to the case of Bloede vs. Bancroft, 98 Fed. Rep., 175, *supra*, but does not answer the reasoning of the learned Judge who wrote the opinion in that case. The Court in the Cassatt case (p. 42), referring to the opinion in the Bloede case, said:

> "In the opinion of the learned judge who decided that case, there is no reference to Bas vs. Steele or Dunham vs. Riley."

These cases we have referred to above, the former being found in 3 Wash. C. C., 381, and the latter in 4 Wash. C. C., 124; and we have shown above that in neither of these cases did the question of the right of the Court to order the production of books and papers *before trial* come up for adjudication, and in neither of the cases was the question considered or decided.

The learned Judge in his opinion in the case of Cassatt vs. Mitchel Coal & Coke Co., *supra*, said (p. 39), that in chancery under a bill of discovery, the Court might order documents in the possession of one of the parties to be produced "on final hearing, or before the examiner who takes the evidence for final hearing, or even *at any time after filing of an answer.*"

The Court cites no case in support of its opinion on this point (except the case of Iasigi vs. Brown, 1 Curtis, 401, *supra*), in which it has been decided that the United States Courts have no power under Section 15 of the Judiciary Act, or Section 724 of the Revised Statutes, to order the production of books before trial, in which the question was really before the Court to be decided. And as we have shown above, in the case of Iasigi vs. Brown the

motion was not resisted on the ground that the Court had no such power, but upon the ground that the applicant had already filed a bill of discovery to obtain the same relief.

We submit that the reasoning of the Court in that case is unsound, and that it does not answer the reasoning of the Court in Bloede vs. Bancroft, *supra,* and that it is contrary to the vast weight of authority in the Circuit Courts in other cases, as we have shown.

We beg to call the Court's attention also to the following cases in the United States Circuit Courts not cited by the petitioners in their brief, in which it has been held that the Circuit Courts had power, under Section 724, to order the production of books and papers before the trial.

CAMERON LUMBER CO. vs. DRONEY, 132 FED. REP., 304.
(Southern Dist. of N. Y.)

LUCKER vs. PHOENIX ASSURANCE CO. OF LONDON, 67 FED. REP., 18.
(Dist. of South Carolina.)

In this case the Court said:

> "It seems, however, to be a narrow construction of Section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery and to secure at law the purposes which such a bill would subserve. All the cases seem to recognize this. On a bill of discovery, necessarily the facts sought would be discovered before trial. Besides this the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in

chancery.' The proceeding in chancery required the deposit of the papers called for with the clerk, who, upon notice, produced them in court before the examiner (2 Daniell's Ch. Prac., 1388, 1389)."

EXCHANGE BANK vs. WASHINGTON CATTLE CO., 61 FED. REP., 190.
(Eastern Dist. of Missouri.)

GREGORY vs. CHICAGO, MILWAUKEE & ST. PAUL R. R. CO., 10 FED. REP., 529
(Dist. of Iowa).

In this case the Court points out that inasmuch as the making of the order lies in the discretion of the Court, it can always provide against oppression by not requiring the books of a party to be produced at a great distance from where they are kept, and in case their production would cause a too serious inconvenience to the party whose books were called for, and this answers the argument of the petitioners here on page 25 of their brief.

NEWCOMB vs. BURBANK, 159 FED. REP., 568.
(Southern Dist. of New York.)

SCHAEFER vs. INTERNATIONAL POWER CO., 157 FED. REP., 896.

We submit, therefore: (1) That the vast weight of authority in the United States Courts is in favor of the power of the Court to make the orders complained of. (2) That the Courts of most of the States, and the English Courts, have the same power by statute. (3) That the power of the Court to make such orders is in furtherance of justice, and the speedy administration thereof, and in accordance with general usage. (4) That sound reasoning and a fair construction of the statute up-

holds the power of the Court to make the orders complained of.

And on this last consideration, the case of People *ex rel.* Wood vs. Lacombe, 99 N. Y., 45, is instructive. In that case the Court of Appeals of the State of New York said:

> "It is the spirit and purpose of the statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be construed so as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some of the provisions of the statute. A reasonable construction should be adopted where there is a doubt or certainty as to the intention of the lawmakers.

II.

Section 724 of the Revised Statues, under which the orders complained of were made, deals with a question of practice and not of substantive law.

Judge LACOMBE, in Schaeffer vs. International Power Co., 157 Fed., 896, on a like motion said:

> "This is a question of practice not of substantial law; and the practice which was settled for this Circuit in Gray v. Schneider (C. C.), 119 Fed., 474, and Cameron Lumber Co. vs. Droney (C. C.), 132 Fed., 304, should not be abandoned because of the decision in the Third Circuit in Cassatt vs. Mitchell Coal & Coke Company, 150 Fed., 32, 81 C. C. A., 80, especially so, as inspection is granted in proper cases, in a majority of the other Circuits."

III.

The record does not present a case for review by this Court by certiorari.

It was said by this Court, in Forsyth vs. Hammond, 166 U. S., 506-514, that the writ of certiorari would only be granted by this Court

> "When the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interest of this nation in its internal or external relations, demand such exercise."

We submit that there is no conflict in this case "between two or more courts of appeal, or between courts of appeal and the courts of a state."

We have pointed out that the decision of the Circuit Court of Appeals in this case is the only decision of a U. S. Circuit Court of Appeals upon this question, where the matter was before the Court, having jurisdiction to determine it in the case presented.

We have pointed out that the decision in the case of Cassatt vs. Mitchell C. & C. Co., 150 Fed. Rep., 32, relied upon by the petitioners, was decided by this Court not to be before the Circuit Court of Appeals in the Third Circuit in such a way that the Court had jurisdiction to determine the question.

IV.

The petition for writ of certiorari should be denied.

JOHN W. BOOTHBY,
ERNEST E. BALDWIN,
Counsel for Respondents.

THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRETT TATE,
Petitioners.

against

DAVID J. WINN,
Respondent.

BRIEF FOR PETITIONERS.

Facts.

This Court granted an application for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit to review the judgment therein affirming a judgment of the Circuit Court against the petitioners. The certified transcript of the record filed with the application for the writ is before the Court as the return (Record p. 36) and we submit this the same brief.

The judgment of the Circuit Court of Appeals is final, except in case it be reversed on this Certiorari.

The case went up to the Circuit Court of Appeals upon a Writ of Error issued to the Circuit Court for the Southern District of New York to review the judgment of that Court entered therein on the 18th day of September, 1907, against the plaintiffs in error, and the orders of said Court, dated the 25th day of June, 1907, and the 31st day of July, 1907, respectively, in pursurance of which said judgment was entered (Record pp. 1-3).

The action, in which said judgment of the Circuit Court was rendered and said orders made, was brought at common law by defendant in error against plaintiffs in error to recover alleged damages claimed by him to have been sustained by him on contracts for the purchase of two hundred bales of cotton on the floor of the New York Cotton Exchange, which contracts he alleged he employed them to make in their own names, but in his behalf, and they sold out the same without calling on him for margins and without his consent (Record, 4-6).

Plaintiffs in error served their answer to the complaint, and therein deny that they were ever employed by defendant in error to buy any cotton or carried any cotton for him or gave him any credit; but they say that they bought a number of bales of cotton for one Bowman and gave him alone credit and frequently called on him for margin, and on his failure to give them margin, they sold out the cotton at a loss and notified him to pay them the balance and that in that lot of cotton were the two hundred bales claimed by defendant in error in his complaint to have been his (Record, 10-14).

After the service of the answer the counsel for defendant in error upon notice to counsel for plaintiffs in error made a motion before Mr. Justice Holt, sitting in Circuit to hear motions, for an order directing plaintiffs in error to exhibit their books before trial, permit defendant in error, his counsel and agents, to investigate, copy and make abstracts of same, and directing that plaintiffs in error, upon failure to comply with said order, should suffer judgment against them, as in cases of non-suit (Record, 6-14).

This motion was made under § 724 of the U. S. Revised Statutes (Record, 19).

Plaintiff's in error resisted said motion, on the grounds that the Court was without jurisdiction to grant an order directing an exhibit of books and papers *before the trial,* and if it had jurisdiction, such an exercise of discretion would not be correct (Record, 14-16; 21-22).

Mr. Justice Holt on June 25, 1907, granted the order asked for, and directed plaintiffs in error to comply therewith by the 15th day of July, 1907, and the order further provided that in the event the plaintiffs in error failed to comply, judgment against them should be entered by default (Record, 17-18).

The 15th day of July, 1907, was at least a year before the case could be reached on the calendar for trial (Record, 21).

With great respect for the learned judge who granted the order, the counsel for plaintiffs in error, informed them that he could not think that §724 authorized the order, and as he knew of no way to have it reversed until judgment was entered thereon, they felt it to be their duty to customers and their business to have the order

reviewed by the higher courts, and they authorized their counsel so to inform the counsel for defendant in error (Record, 20-21).

On July 16, 1907, counsel for defendant in error made a motion before Mr. Justice Hough for judgment against plaintiffs in error by default, pursuant to Section 724 of the Revised Statutes, and that a writ of inquiry be issued to the marshall to assess the damages (Record, 18-21).

Plaintiffs in error filed affidavits in opposition to said motion contending that the court had not authority to grant judgment or the writ, and that if it did it would be an improper exercise of discretion (Record, 21-22).

On the 31st day of July an order was made granting the motion (Record, 22-23).

The judgment was entered against the plaintiffs in error for $2,275, and $65.45 costs (Record, 26-27).

The plaintiffs in error thereupon sued out the writ of error already mentioned and filed an assignment of errors and the bond required by law (Record, 27-33).

The errors assigned raise the questions whether the Court had authority to enter the judgment and make the orders, and if it had authority, whether its discretion was properly exercised (Record, 27-30). The judgment was affirmed (Record 33-35).

Thereupon application was made to this Court for the Writ of Certiorari already mentioned.

POINTS.

I.

The decision of the court below in the case at bar construing Sec. 724 of the Revised Statutes of the United States as giving power and authority to Circuit Courts to order a party to an action at law to exhibit his books to the opposite party before the trial, is in conflict with the prior decisions of the Circuit Court of Appeals of the Third Circuit construing said section, and also in conflict with the decisions of Circuit Courts in other circuits construing the same section; AND IT IS IN CONFLICT WITH THE PLAIN LANGUAGE OF THE STATUTE, AND IS ERRONEOUS.

Said Section reads as follows:

> "Sec. 724. *In* the *trial* of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

This section of the revised statutes is Sec. 15 of an act entitled "An Act to establish the Judicial Courts of the United States," passed September 24, 1789.

1 U. S. Stats., 73, *82*.

On April 7, 1789, at the first session of the senate, Senators Oliver Ellsworth, of Conn., William Paterson, of N. J., William Maclay, of Penn., Caleb Strong, of Mass., Richard Henry Lee, of Va., Richard Bassett, of Del., William Few, of Ga., and Paine Wingate, of N. H. were appointed a committee to bring in a bill for organizing the judiciary of the United States.

1 Annals of Cong. 18.

This was to carry out the terms of the Constitution of the United States, which had been recently adopted by eleven of the original thirteen states, and which had provided in regard to the courts of the United States as follows:

> "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish * * *."

U. S. Const., Art. III, Sec. 1.

On June 12, the committee brought in the bill.

1 Annals of Cong., 46;
Journal of Maclay, 74.

And it was discussed there, from time to time, until July 17, when, after being amended, it was passed and sent to the House on July 20th.

1 Annals of Cong., 48, 49, 659;
Journal of Maclay, 85, 88, 89, 91-93, 93-94, 95-96, 97-98, 98-100, 101, 101-102, 102-103, 104-105, 106-109, 117.

It was in the House from July 20, to September 17, when it was passed, with amendments, and reported back to the Senate.

1 Annals of Cong., 782-785, 796-820, 820-834, 888, 892, 894;
Journal of Maclay, 152.

On September 17, the Senate referred the bill to a committee composed of Ellsworth, Butler, of S. C., and Paterson.

1 Annals of Cong., 80.

On September 19, the Senate reported to the House that it concurred in some amendments and disagreed as to others; and on September 21, the House re-considered the amendments disagreed to by the Senate and adopted them (*sic*).

1 Annals of Cong., 903, 904.

It is seen from the foregoing that Senator Paterson of N. J., was not only a member of the Judiciary Committee; but he was one of the three members appointed by the Senate to consider the bill when sent back by the House with amendments.

On March 4, 1793, William Paterson was commissioned as one of the Associate Justices of this Court; and was assigned to the Middle Circuit, composed of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia,

and he sat with Mr. Justice Peters in the district of Pensylvania, in April, 1795.

2 Dallas, 331.

And before that court, so composed, in April, 1795, the first reported case involving a construction of Sec. 15 of the Judiciary Act, now Sec. 724 of the Revised Statutes, came up.

Geyger's lessee *v.* Geyger, 2 Dallas, 332.

The statement in the case says:

> "A rule has been obtained by the plaintiff, requiring the defendant to show cause why an order should not be made for the production of certain deeds and papers, *on the trial* of this cause, agreeable to the 15th section of the judicial act; and now, it was moved to make the same absolute.
>
> But, for the *defendant*, it was contended, that the notice of the rule should have been given to the party, and not to his attorney."

The Court said that the act did not designate to whom the notice should be given, the party himself or his attorney; and went on to say:

> "But we will always keep the case under our control, for the purposes of substantial justice, and never suffer either party to be entrapped. If, for instance, notice is served on an attorney, whose client lives at a great distance, this will always be deemed a sufficient reason *to postpone the trial*, until a full opportunity has been afforded for the attorney's communicating the rule to the client."

That language shows that there was no thought in the minds of Mr. Justice Paterson and Mr. Jus-

tice Peters that books could be ordered shown to the opposite party at an earlier time than "on the *trial,*" where the party applying could be cross-examined by his opponent, and the relevancy of the documents determined by the court on *evidence* and any other question as to the right of the party to see the books determined in a plenary way.

There was no dream in the minds of the Senators, when the act was passed, that an *inquisition* into the books and affairs of a party to an action at law could be instituted *before the trial.* This is shown by the debate which occurred on a clause in the bill, as first drawn, which *required a defendant, on oath, to disclose his or her knowledge in the cause, etc.,* and which, after debate, was stricken out. Senator Maclay's report of the debate says:

> "We got on to the clause where a *defendant* "*was required on oath, to disclose his or her* "*knowledge in the cause, etc.,* I rose and de- "clared that I wished not to take up the time "of the committee, as, perhaps, few would "think with me (this I said in allusion to "what had happened in the committee when "I had exerted myself in vain against this "clause), but that I could not pass in silence "a clause which carried such inquisitorial "powers with it, and which was so contrary "to the sentiments of my constituents; that "extorting evidence from any person was a "species of torture, and inconsistent with the "spirit of freedom. But perhaps I should "say something more pointed when the mat- "ter came before the House in Senate. (My "reason of acting thus was: I had spoken to "Mr. Morris and found he would not second "me in it, as Myers Fisher had not taken no- "tice of this matter in his letter.) Patter-

"son, however, of the Jerseys, sprang up; "declared he disliked the clause, and having "spoken a while moved to strike it out. I "then rose and declared, since one man was "found in the Senate for striking it out, I "would second him.

"Up now rose Elsworth, and in a most "elaborate harangue supported the clause; "now in chancery, now in common law, and "now common law again, with a chancery "side. He brought forward Judge Black- "stone, and read much out of him. Patter- "son rose in reply, and followed him through "these thorny paths, as I thought, with good "success. He showed justly enough, that "Blackstone cut both ways, and nothing "could be inferred from him but his ridicul- "ing the diversity of practice between chan- "cery practice and that of common law. Els- "worth heard him with apparent composure. "He rose with an air of trumph on Patter- "son's sitting down. 'Now,' said he, 'every- "'thing is said that can possibly be said to "'support this motion. The very most is "'made of it that ingenuity can perform'; "and he entered again the thorny thicket of "law forms, and seemed to batter down all "his antagonist had said by referring all "that was advanced to the forms of law, "with which everything had been shackled "under the British Government. He really "displayed ingenuity in his defense. He "made repeated use of the term 'shackled,' "and how we were now free, and he hoped "we would continue so.

"I determined to have a word or two at "the subject. Said I was happy to hear that "the world was unshackled from the customs "of ancient tyranny; that there was a time "when evidence in criminal cases was ex- "torted from the carcass of the wretched cul- "prit by torture. Happily we were un- "shackled from this, but here was an at-

"tempt to exercise a tyrany of the same "kind over the mind. The conscience was to "be put on the rack; that forcing oaths or "evidence from men, I considered as equally "tyrannical as extorting evidence by tor- "ture; and of consequence had only the dif- "ference between excusable lies and wilful "perjury. I hoped never to see shackles of "this kind imposed. Chancery had been "quoted; common law had been quoted as "practiced in England, but neither would "apply to the present case. The party was "to answer in chancery, but it was to the "judge, and his questions were in writing; "but here, by the clause, he must be examin- "ed in the open court before the bench and "jury and cross-examined and tortured by "all the address and malice of the bar. I "had further to add that, by the Bill of "Rights of the State that I had the honor to "represent, *no person could be compelled to "give evidence against himself;* that I knew "this clause would give offence to my con- "stituents.

"Elsworth rose and admitted that three "new points had been started. He aimed a "reply, but I thought he missed the mark in "every one. The rage of speaking now "seemed to catch the House. Bassett was "up; Read and Strong [were] at it. We sat "till half after three; and an adjournment "was called before the question was put. "Elsworth moved an amendment that the "plaintiff, too, should swear at the request "of the defendant, just before the House ad- "journed.

"*June 30th*—I am still miserably lame with "the rheumatism. Attended at the Hall at "the usual time. The clause with Elsworth's "amendment was taken up. I rose first. "Said that instead of the clause being amend- "ed, I thought it much worse; that it was

"alleged with justice against the clause, as "it stood before, that great opportunities and "temptations to perjury were held out, but "this was setting the door fairly open. The "contest now would be, who would swear "most home to the point. If I was against "it before, I was much more so now. Mr. "Lee rose, and seemed to mistake the mat- "ter. I rose and endeavored to do the busi- "ness justice.

"Up rose Elsworth and threw the common "law back all the way to the wager of law, "which he asserted was still in force. Strong "rose and took the other side in a long har- "angue. He went back to the ancient trial "by battle, which, he said, was yet unre- "pealed, but said repeatedly there was no "such case as the present. Elsworth's tem- "per forsook him. He contradicted Strong "with rudeness; said what the gentleman "asserted was not fact; that defendants were "admitted as witnesses; that all might be "witnesses against themselves. Got Black- "stone; but nothing could be inferred from "Blackstone but such a thing by consent. "Patterson got up, and back he went to the "feudal system. He pointedly denied Els- "worth's position. Bassett rose. Read rose, "and we had to listen to them all. The ques- "tion was, however, put first on Elsworth's "amendment, and was last; next on striking "out, and it was carried."

Journal of Maclay, 92-94.

If the inquisitorial clause was striken out, the Senate could not have imagined that Sec. 15 of the act would ever be held to empower a court to make a party exhibit what he had written in his books, before there was a plenary hearing on the trial as to relevancy, or whether the party applying had any right to see them.

If any one was competent to know what was in the minds of the legislators who passed section 15 of the Judiciary Act, it was Mr. Justice Paterson.

In Carson's "History of the Supreme Court", it is said of him: "He served as a member of the judiciary committee, and next to Ellsworth, took the most active work of framing the Judiciary Act".

Carson's Hist. of Supreme Ct., 184.

The practice stated in Geyger's lessee *v.* Geyger, *supra,* at which Mr. Justice Patterson presided, remained the practice; and it was not questioned for years, which instance will be noticed later.

In 1806, Bushrod Washington, an Associate Justice of this Court, was attending circuit in the District of Pennsylvania, and a case came before the Court at which he was presiding in which one of the parties had been notified under Section 15 of the Judiciary Act to produce in the trial a will; and the will was handed to the Court; but Mr. Justice Washington would not let it be put in evidence, on the ground that it would not be proper under a bill of discovery.

Hylton *v.* Brown, 1 Wash., C. C. 298.

In 1818, when Associate Justice Washington was again presiding in the District of Pennsylvania, another case came up before him for trial; and the defendant moved for non-suit against the plaintiff on whom he had served only notice to produce at the trial, and apparently not containing a clause that he would move for non-suit in case the papers

were not produced. Mr. Justice Washington, in denying the motion for non-suit, said:

> "In every case, the party claiming the papers must give *evidence* of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or a non-suit, is intended to be claimed, the notice to produce papers must give the party information that it is intended to move for a non-suit; or a judgment by default, as the case may be; and this must hereafter be considered as the rule of the Court under this section of the act of Congress."
>
> Bas *v.* Steele, 3 Wash. C. C. 381.

It will be observed that "evidence" is spoken of in that case—not *affidavits.*

In 1821, a rule upon the plaintiff to show cause why he should not produce certain books, papers, and accounts *at the trial* of a case was applied for before Mr. Justice Washington sitting in the same Court; and he said, as to whether the order to show cause should be made absolute:

> "We think it need not be so, but that upon the rule to show cause it may be made *nisi,* leaving the Court at liberty to enforce the rule, unless the plaintiff can show, *at the trial,* good cause for not producing them. If the rule be made absolute at the time when it is argued, the Court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not. If the case should be simple, and such inquiry should not appear to be necessary, the Court may at once discharge, or make the rule absolute."
>
> Dunham *v.* Riley, 4 Wash. C. C. 126.

It can be seen from that language, that, whether the rule was absolute *or nisi,* the *production* was to be "at the trial."

Thus the practice of having the production only at the trial, as it obtained at the trial presided over by Mr. Justice Paterson, prevailed for thirty-three years after the act was passed; and it does not appear to have been questioned for two years afterwards.

In 1823, however, in a case in the Circuit Court of the District of Columbia the plaintiff, having given notice, moved the Court for an order on the defendant to produce his bankbook and surrendered vouchers, by a certain day *before* the trial; and notwithstanding the Act and the case presided over by Mr. Justice Paterson in 1793 were cited, the Judge, without any reason reported, ordered the defendant to show his bank-book and surrendered vouchers to the plaintiff's counsel before the trial.

Central Bank *v.* Tayloe, 2 Cranch. C. C. 427.

But in 1829, the Circuit Court of the District of Columbia, in another case, held, that plaintiff's counsel had no right to examine defendant's letter books before the trial, to see whether there were not something in them pertinent to the issue.

Triplett *v.* Bank, 3 Cranch. C. C. 646.

In 1835, in that same Court it was held that it was not too late after the jury is sworn, to call for the books which the Court has ordered to be produced at the trial.

Waller *v* Stewart, 4 Cranch. C. C. 532.

It would thus appear that it became the practice of that Court to order the books produced *at the trial.*

Not until 1846, does the practice that was followed in the cases before Mr. Justices Paterson, Washington and the later judges of the District of Columbia appear to have been varied from or again questioned—a period of more than half a century after the act was passed—until a case came before Judge Betts, of the District Court of New York, sitting in the Circuit Court, and he held that the plaintiff could be required to show his papers to the defendant *before* the trial. But he so decided under the influence of the rule which permitted it in the State Courts of New York.

Jacque *v.* Collins, 2 Blatch. C. C., 23.

In 1851, in another case before the same judge, the plaintiff asked for an order, upon a notice and affidavit, requiring the defendant to exhibit his books and papers; but he denied the motion upon the ground that they could not be seen under a bill of discovery.

Finch *v.* Rikeman, 2 Blatch., 301.

In 1853, the question whether the section gives the power and authority came before the Circuit Court of the District of Massachusetts, where Benjamin R. Curtis, an Associate Justice of this Court, presided.

Iasagi *v.* Brown, 1 Curtis, 401.

In that case, at p. 402, Mr. Justice Curtis said:

> "It (the Act of Sep. 24, 1789, 1 Stat. at Large, 82, §724), does not enable parties to

compel the production of papers before trial, *but only at the trial,* by making such a case, and obtaining such an order as the act contemplates."

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the Court should not decide finally on the materiality of the paper, except *during the trial;* because it would occupy time unnecessarily, and it might be difficult to decide beforehand, whether a paper was pertinent to the issue; and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty *during a trial, after the nature of the case, and the posture and bearings of the evidence are seen."*

In 1868 another case came up in the District of Massachusetts; and then Nathan Clifford, an Associate Justice of this Court, presided, and he followed the former decision of Mr. Justice Curtis.

Merchants Nat. Bk. *v.* State Bk., 3 Cliff., 201.

In 1879, two cases arose in the District Court of New York, and Choate, District Judge, followed the decision of Judge Betts in 1846 in Jacque *v.* Collins, holding that inspection of books could be had *before* the trial, under the influence of the State practice.

U. S. *v.* Youngs, 10 Ben., 264.
U. S. *v.* Hutton, *Ib.*, 268.

But in 1885, a case came up before the Circuit Court for the Southern District of New York, at

which Mr. Justice Wallace presided; and the Court, citing the case of Beardsley *v.* Littel, 14 Blatch., 102 (1877), decided by Samuel Blatchford, afterwards an Associate Justice of this Court, held that § 724 did not permit an examination of a party's books *before* trial. And thus he did not follow the above decisions of District Judges Betts and Choate, but those of Associate Justices Paterson, Washington, Curtis and Clifford.

Colgate *v.* Compagnie Francaise, 23 Fed., R., 82.

In 1887, the question came up before Mr. Justice Lacombe of the Circuit Court of the same District, and he followed the decision of Mr. Justice Wallace, and said:

> "This is an application under the United States Revised Statutes, § 724, to require the plaintiff, the official liquidator of Charles Fortin & Co., of Paris, France, to produce for inspection of the defendants, in order to enable them to prepare for trial, all the business books of that firm from the years 1872 to 1878, inclusive. A similar application made in the case of Colgate *v.* Compagnie Francaise, was denied by Judge Wallace (January 1884), on the ground that the proper practice to obtain such relief in this circuit is by bill of discovery. A statement of the considerations which have induced the adoption of such practice will be found in the report of the same case, upon demurrer to bill of discovery, in 23 Blatch., 86, 23 Fed. Rep., 82.
>
> The motion is therefore denied."

Guyot *v.* Hilton, 32 Fed. Rep., 743, 744.

Thus the question seemed settled in the Southern District of New York that an inspection of books was not authorized under § 724 *before* the trial.

But in 1899, a case came before District Judge Bradford, of the District of Delaware, sitting in Circuit, and he, reviewing a number of cases, decided that an inspection of books and papers before trial was allowed under § 724. He cited Central Bank *v.* Tayloe, *supra,* as the leading authority for his decision; and curiously enough he overlooked the prior cases of Bas. *v.* Steele, *supra,* and Dunham *v.* Riley, *supra,* and he cited the case of U. S. *v.* Youngs, *supra,* and U. S. *v.* Hutton, *supra,* of the District Court of New York, as authorities for his decision, and overlooked the cases of Colgate *v.* Compagnie Francaise, *supra,* and Guyot *v.* Hilton, *supra,* of the Circuit Court of New York, which were authorities the other way. The learned Judge was in error besides in supposing that some of the cases he cited as authorities for his decision were such.

Bloede *v.* Bancroft, 98 Fed. Rep., 175.

In 1902 the above case was cited in a case before Mr. Justice Lacombe, and he was so impressed by the opinion that he considered it exhaustive as showing that the weight of authority was in favor of granting the motion to see the books of the plaintiff, and so he followed that authority and granted the motion.

Gray *v.* Schneider, 119 Fed. Rep., 474.

But in the meantime, viz., in 1896, a case had come up in the Circuit Court of the District of New Jersey, and Green, District Judge, sitting in that court, said of § 724:

> "Within the terms of this statute alone must be found, then, the right of the plaintiff to ask for and receive the discovery it seeks; * * * . But by the very words of the statute the exercise of the power vested in federal courts to require production of such books or writings is limited to causing such production to be made at the trial. The words are not, broadly, 'in any action at law at any time' the court may require the production of books, but there is an express limitation found in the words 'on the trial of any action.' It is, then, at that particular time—at the trial, and at no other time—that the court may, in its discretion, order books to be produced; and that this is the proper construction of this statute is settled by many well-considered cases."
>
> United States *v.* Nat. Lead Co., 75 Fed. Rep., 94, *95*.

While the learned Judge quotes the Statute as reading "on the trial of any action", when it reads "in the trial of actions", that only shows that he considered "in" to be equivalent to "on"; and in that, it is submitted that he was right.

And in 1894, a case came up in the Circuit Court of the District of Connecticut, Townsend, Circuit Judge, sitting, and it was considered that the production of the books were to be at the trial.

> Kirkpatrick *v.* Pope, 61 Fed. Rep., 46, *47*, *49*.

Thus it will be seen that the learned Judge in Gray *v.* Schneider, *supra,* fell into error in considering that the weight of authority, as claimed in Bloede *v.* Bancroft, *supra,* was in favor of motions to see books *before* trial, and in giving up his own opinion as expressed in Guyot *v.* Hilton, *supra.* While the Delaware case is well reasoned, it has been seen not to be exhaustive; and, with great respect, it is submitted that it is not sound; and its authority has been overruled by the Circuit Court of Appeals of the Third Circuit.

In 1907, the case of Bloede *v.* Bancroft was considered in a case that came up before the Circuit Court of Appeals, and that court pointed out omissions and errors in it, and after considering many authorities said:

> "We conclude, therefore, that section 724 does not confer the power to require a party to produce books before trial".
>
> Cassatt *v.* Mitchell C. & C. Co., 150 Fed. Rep., 32, 44.

Two cases that were heard at the same time involving the construction of § 724 were brought up to this Court by *certiorari* and reversed, but on the ground that the order was only interlocutory, and not on the ground that the section had been misconstrued (207 U. S., 181, 187.) The case of Cassatt *v.* Mitchell, *supra,* seems not to have been carried up and remains the law in the Third Circuit. And that is the law in that Circuit now, as is seen in another case.

> Penn. R. R. Co. *v.* Int. C. M. Co., 156 Fed. Rep., 765.

The attention of the Circuit Court of Appeals on the hearing of the case at bar was called to those two cases decided by the Circuit Court of Appeals and they were considered; but the learned Court of the Second Circuit declined to follow them, and said:

> "The question whether under Sec. 724 a party could be required to produce his books and papers before the trial is one which has been frequently considered; the decisions rendered in different districts are not harmonious. * * * It is unfortunate, perhaps, that there should be diversity in the practice in different circuits, but the remedy for that would be an application for *certiorari* to the Supreme Court."

The petitioners applied to this Court for the writ of certiorari and it was granted; and they now submit that the learned Court below has erred in its judgment affirming the judgment of the Circuit Court.

In addition to what has been said in the cases cited from the Circuit Court of Appeals of the Third Circuit and from the cases in the other Circuits, and in the debate that occurred in the Senate when Section 15 of the Judiciary Act was passed, it is submitted that the language of that section, now Section 724, is plain to the effect that books and papers, in actions at law, are not to be shown to the opposite party involuntarily before the trial. The section does not say "in actions at law." It says: "in *the trial of* actions at law." If the eminent body, much learned in the law and well grounded in the basic principles of our government, had intended that books and papers should be shown to the opposite party *before* the trial,

they would not have used the extra words "the trial of," but would have simply said "in actions at law." The several lawyers, who dealt with the bill, certainly knew the force and meaning of words; and they should not be held to have used three surplus words unnecessarily, or the word "in" for "before."

Again, there were amendments to the bill; and, as one clause stricken out provided for an *inquisition,* it is possible and perhaps more than possible, that the three words, in "the trial of," were inserted by way of amendment of the section to put it as nearly in accord as possible with the tenor of the bill, after the obnoxious clause was stricken out.

Moreover, it was going far enough to allow questions of relevancy and the right of a party to see books to be decided *in the trial,* without pleadings on those points, the same as they would be decided in proceedings in chancery on a bill of discovery. In a bill of discovery the proceedings are plenary and heard upon pleadings and proofs where each side can cross-examine. In the trial of an action at law, the section dispenses with pleadings; but it does not dispense with the right to cross-examine. It was intended that the hearing should be in the place of a plenary suit. No other legislative body had before granted such power to a common law court.

1 Thompson on Trials, §731.

Not one word is said in the Statute about the hearing as to right to see and relevancy being on *affidavit.* It says "upon notice." Of course, as right and relevancy were to be decided in the trial,

no affidavit was necessary; for the Court would hear the "evidence."

It is submitted that only in connection with the other testimony in a case can the Court know what right the applicant has to see books and papers and the relevancy. There is no fairness vouchsafed in a hearing of these questions on affidavits. There is no chance to see and cross-examine the affiants, and it gives an undue advantage to those who are willing to swear anything when there is no cross-examination. Besides, the Judges cannot know by affidavits what are the real facts involved in the case and these affidavit contests are a burden upon them and a nuisance to lawyers. Besides, it is possible for a party to get an order to inspect his opponents' books *before the trial,* without making any affidavit himself under the construction given §724 by the learned Court below. Indeed, it was done in the case at bar. Winn made no affidavit at all! And yet he got an order giving him or his lawyer leave to see and inspect petitioner's books for two years and copy the same—whether the accounts were in his name or that of P. G. Bowman, or that of the Sumter Bank, two parties not made parties to the action! From discretionary interlocutory orders in the Federal Courts there is no appeal except as to injunctions and reviews.

26 Stats. 828, §§6, 7.

In a State Court there would be.

The fact that the Statute provides that the party failing to show books shall suffer "nonsuit" or "default," as the case may be, shows that it was to be at the trial; for, as pointed out in Cassatt *v.* Mitchell, *supra,* that was the only time when a nonsuit or default could be granted in those days.

The clause "in cases and under circumstances where they might be compelled to produce by the ordinary rules of proceedings in chancery," contained in the section, does not refer to *time*. The clause says "in *cases* and circumstances *where*." That means that if the books and papers were relevant in chancery, they would be in the trial of an action at law. The case of Hylton v. Brown, *supra*, illustrates the value of that phrase in the section.

The construction placed upon §724 by the Court below would make it possible in a case pending in New York to require a party living in California to produce his books in New York *before* the trial, and also at the trial. Or, if his adversary concluded not to use them after seeing them, it might nevertheless be necessary for the party owning the books to bring them to the trial. Such a possibility shows that the authors of the Act never contemplated such a construction being placed on it.

The Act should be construed under the lights then existing. As was said by Mr. Justice Wallace in a case already cited:

> "There can be no ebb and flow of jurisdiction dependent upon external changes."
>
> Colgate *v.* Compagnie Francaise, *supra*.

The petitioners have a right to keep their books and papers a secret under the common law and the Constitution, and §724 should be construed strictly, like an attachment statute.

> Entrich *v.* Carrington, 19 Howell St. Tr. 1029.
>
> Boyd *v.* United States, 116 U. S., 616, 626-27.

Congress having provided for discovery, there is no other authority. The Statute of New York and the practice in that State can not affect the question.

Ex parte Fisk, 113 U. S. 713.
Amy *v.* Watertown, 130 U. S. 301.
Pierce v. Un. Pac. R. Co., 47 F. R., 709.
Hanks D. Ass'n. v. Tooth Av. Co., 194 U. S., 303.
Shumacker v. Security Co., 159 F. R. 112.

II.

The judgment below should be reversed.

Respectfully submitted,

JOHN R. ABNEY,
Counsel for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 12.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BASSETT and STEWART TATE,

Petitioners,

vs.

DAVID J. WINN,

Respondent.

BRIEF FOR RESPONDENT

JOHN W. GOODWIN,
ERNEST F. BALDWIN,

Counsel for Respondent.

Supreme Court of the United States,

OCTOBER TERM, 1910.

JOSEPH N. CARPENTER, NATHANIEL L. CARPENTER, ATMORE L. BAGGOT and STERRET TATE,
Petitioners,

AGAINST

DAVID J. WINN,
Respondent.

BRIEF FOR RESPONDENT.

The only question for review in this case is whether the Court had *power and authority* under Section 724 of the Revised Statutes to make the order of June 25th, 1907, for a discovery of books, &c. (pp. 17 and 18 of the Record), and to make the order of July 21st, 1907, declaring the plaintiffs to be in default for not obeying the order of June 25th, 1907, and authorizing judgment to be entered against them by default (pp. 22-23 of the Record), and to enter judgment against the petitioners in accordance with that order (pp. 26-27 of the Record).

There is no question raised but that, if the Court

had that power and authority, and exercised its discretion to make those orders, that discretion was properly exercised.

All of the facts necessary to sustain the order, if the Court had power and authority to make it, were found by the Court below, and will not be reviewed here. In other words, the Court below found that it was established that the books and writings ordered to be produced, were in the possession or power of the defendants in the case, the petitioners here, and that they contained "evidence pertinent to the issue," and that the record presented a case and circumstances where the petitioners might be compelled to produce the books and writings ordered to be produced "by the ordinary rules of proceeding in chancery," as provided by Section 724 of the Revised Statutes.

Nor is any question raised on the record that if the Court had the power and authority under Section 724 to order the production of these books before trial, the plaintiff, the respondent here, did not pursue the *right practice* to obtain their production, and to recover the judgment on the failure of the petitioners to obey the order for their production.

The statement as to the various steps taken below, contained in pages 1 to 4 inclusive of the Petitioners' Brief, is substantially correct and need not be repeated here.

POINTS.

I.

Section 724 of the Revised Statutes authorizes and empowers the Circuit Court to make an order for the production of books and writings before the trial of the action, as well as on the trial, upon motion, where facts are presented to it by affidavit or otherwise showing that such books and writings are in the possession or power of the party from whom the same are required, and that they contain evidence pertinent to the issue, and the orders and judgment complained of were therefore valid.

Section 724 of the Revised Statutes reads as follows:

> "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

It is a substantial re-enactment of Section 15 of an act entitled "An Act to Establish the Judicial

Courts of the United States," passed September 24th, 1789. That section was enacted, among other things, for the purpose of providing a summary way in which a party to an action at law might procure the discovery of books or writings in the possession or power of the other party, and not be compelled to resort to the cumbersome method provided by a bill of discovery. And it expressly provided that this summary method could only be resorted to "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

The method by which such discovery of books and papers could be compelled "by the ordinary rules of proceeding in chancery" was by bill of discovery, and by that method, discovery of such books and papers could be, and had to be, compelled before the trial of an action at law.

Story on Equity Jurisprudence, Section 1485.

2 Daniel's Chancery Practice, 1556.

As we have said, the 15th Section of the Judiciary Act was intended to provide a summary way to obtain the discovery of books and writings, in the furtherance of justice.

Such summary methods by which a party to an action at law can obtain a discovery and inspection of books and papers in the possession of the other party, containing evidence pertinent to the issue, *before the trial,* have in most of the States, and in England, been provided by statute, and furnish the common method of procedure in such cases, and if it be that Section 724 of the Revised Statutes above referred to does not authorize and empower the United States Courts to grant such discovery and inspection, those Courts are without a power exercised by most of the State Courts, and by the English Courts.

In New York, Sections 803 to 808 of the Code of Civil Procedure provide such a summary method, and in England it is provided by the Common Law Procedure Act, 17 and 18 Victoria, Chapter 125, Section 50, and in that statute, as in the New York statute, and in the statutes of most of the States, the application is made by *affidavit,* showing the possession of the books by the other party, and their pertinence to the issue.

And the vast weight of authority in the United States Courts as to the power of the Court to grant an inspection under Section 724, *before the trial,* is in favor of such power, so that such power is sustained by principle as well as by authority.

We have carefully examined the cases cited by the petitioners in their brief on this application, with the following results:

GEYGER'S LESSEE *vs.* GEYGER, 2 Dallas, 332:

The question whether the Court could, under Section 15 of the Judiciary Act, order the production of books or writings *before* the trial, or *at* the trial, was not raised, discussed or considered in this case. The *motion was* that the books, etc., be produced *"at the trial,"* and the only point raised or decided was that notice to the attorney was sufficient notice. The Court incidentally remarked that it would see that the client had plenty of time to produce the books, and to that end would, if necessary, adjourn the trial.

LESSEE OF HILTON *vs.* BROWN, 1 Wash. C. C., 298:

This was an action of ejectment. On the trial, before the impaneling of the jury, the defendant read a notice to plaintiff's counsel to produce *at the trial* a Will of one Griswold who, by deed, had leased the land to the plaintiff. It was objected that the application was premature, and could not

be made except during the trial, after a jury had been impaneled. The Court denied the motion, but on exactly what grounds does not appear, except that the Court had no proof before it that the Will was "pertinent to the issue," and only when that proof was furnished, could it tell whether the Will ought to be produced or not. There was no affidavit on the motion showing that it was pertinent. The jury was then impaneled, and the plaintiff offered evidence of his title, and that it came through Griswold. The defendant then went on with his case, and renewed his motion that the plaintiff produce the Will, and the plaintiff handed it to the Court, but insisted that it was not a case in which under the Act he was compelled to produce the Will, as it had not been shown that it was "evidence pertinent to the issue," and that he could not have been compelled to produce it "by the ordinary rules of proceeding in chancery." The Court, WASHINGTON, *J.*, said:

> "The remedy provided by the Act of Congress is merely cumulative; *and to save the time and expense of a bill of discovery*, it enables the court to do in a *summary way* what they might do if a *bill of discovery were filed* on the equity side of the court, and no more."

He then proceeded to show that the discovery of such a paper could *not have been obtained* by such a bill, because it could only tend to defeat the plaintiff's title, and not to prove title in the defendant. The rest of the case is on other points.

The case is barren, as we read it, of any adjudication, or even opinion, as to the construction of the 15th section of the Judiciary Act, as to whether a discovery can be ordered before the trial on motion and affidavit, or by petition, showing that the document of which discovery was sought was "pertinent to the issue."

BAS *vs.* STEELE, 3 Washington C. C., 381:

This was an action for damages against the Collector of the Port of Philadelphia for refusing to clear a Spanish vessel. After the suit was commenced, but before the trial, the defendant's counsel gave notice to the plaintiffs to produce certain documents and papers *on the trial,* and *at the trial* called for them. Counsel for the plaintiffs stated that the plaintiffs did not have the documents and papers, and that they were not in existence, except a log book of the vessel, which was on the vessel at Havana, and some other papers which seem to have been produced and put in evidence. Thereupon the defendant's counsel moved for a non-suit on several grounds, one of which was that the 15th section of the Judiciary Act, now Section 724 of the Revised Statutes, gave him that right. The plaintiff's counsel opposed the motion on several grounds, among which was that the provisions of that Act "applied only where a *motion had been made* to the Court for an order on the party to produce the papers, followed by a notice thereof, and some evidence that the party called upon for them had them in his possession, and that they were pertinent to the issue" (p. 385).

The Court denied the motion on all the grounds urged, and in respect to the ground of the non-production of the papers, he rested his decision on the following reasons, as will be seen from the opinion, pages 386, 387: (1) It was not shown that the party called on for the papers had them, or that they were pertinent to the issue. (2) That the uncontradicted evidence was that the plaintiff had not the papers, and that they never existed. (3) That no notice had been given to the plaintiff of any motion or application for a non-suit, as a consequence of his not producing the papers.

The question as to whether the Court *had the*

power to order the production of the papers *before* or *at* the trial was not raised or discussed at all. As we have pointed out, the notice was to produce them *at the trial.* The case has no bearing on the question under discussion in the case at bar.

DUNHAM *vs.* RILEY, 4 Wash. C. C., 126:

This was an application or motion for a rule or order to direct the plaintiff to produce certain books and papers *at the trial.* It was made in advance of the trial on notice. The Court held that it was properly so made, and that an order in advance of the trial was necessary, and the only other question considered was whether the order should be absolute in the first instance, or *nisi.* The Court said it *might* be *nisi,* and so made it. It was not held, or even intimated that the order might not, in the discretion of the Court, and on a proper showing be made absolute for the production of the books in the first instance. The case, however, does not bear in any way on the question as to whether the Court had the power to order the production of books, etc., for inspection before the trial. The point was not at issue, and was not considered or decided.

CENTRAL BANK *vs.* TAYLOE, 2 Cranch, C. C., 427:

(Decided 1823.)

This was an action of assumpsit on open account, and for moneys lent and advanced. This is the *first case* in the United States Courts, which is reported, in which a motion was made *before the trial* for the production of books and papers for inspection *before the trial,* under Section 15 of the Judiciary Act of 1789 (1 Stat. at Large, 73). It brought the question here at issue squarely up for judicial determination, and the Court decided squarely that

under that Act an order could be made for the production of books *before the trial,* and made such an order directing the production of the books and papers on a day before the trial, "for the inspection of plaintiff's counsel."

This is not only the first case in which the point now at issue was decided, but it is a leading and well considered case.

TRIPLETT AND NEALE *vs.* BANK OF WASHINGTON, 3 Cranch, 646:

The plaintiffs gave notice to the defendant in advance of the trial to produce "*at the trial* certain letter books to be used in evidence." The Court considered the call or notice too general, and that it had not been shown to the satisfaction of the Court "that the books called or contained *evidence pertinent to the issue.*"

It is stated that Mr. Neale, apparently one of the plaintiffs who had given the notice, orally claimed in Court that he had a right to look at the books before the trial "to see whether there was not something in them pertinent to the issue." The Court thought not, but that was *not* the order asked for. The expression of the opinion of the Court went no further than that it was considered that the applicant for an order to produce books and papers, whether at or before the trial, must satisfy the Court that they contain evidence pertinent to the issue, as a prerequisite to the order.

The plaintiff then gave a fuller notice to produce the books, etc., "*at the trial,*" and moved for an order for such production. It was objected that the notice was still too general, and that there was nothing before the Court to show that there were any such books, or that they contained anything pertinent to the issue. The Court refused to make the order *on that ground,* and on that ground only. It was not a question of the jurisdiction or power

of the Court to make any order for such production either *at* or *before* the trial. It was merely a decision that on the facts before it, the Court was of the opinion that enough had not been shown to satisfy the Court that it should exercise its discretion and make an order for the production of the books at the trial. The case is not at all an adjudication contrary to that in Central Bank *vs.* Tayloe, *supra.* It was made by the same Court, consisting of the same Judges as decided the case of the Central Bank against Tayloe. If they had intended to overrule their own decision in that case, they would certainly have referred to it, and said so.

WALKER *vs.* STEWART, 4 Cranch, C. C., 532:

This case has no bearing upon the question at issue in the case at bar. The defendant had obtained an order for the plaintiff to produce his books *upon the trial.* Upon the trial he called for the books, and the plaintiff's counsel claimed it was too late after the jury was sworn. The Court thought that a motion for a *non pros.* for non-production of the books was not too late, if made on the trial, after the book was in Court and in the possession of the plaintiff's counsel, who refused to produce it. It was then produced. There was then raised the question as to whether if the defendant's counsel inspected the book, that made it competent evidence for the plaintiff. The Court thought it did, and thereupon the counsel declined to inspect it.

JACQUES *vs.* COLLINS, 2 Blatch., C. C., 23:

(Decided in 1846, BETTS, *J.*)

This is the *second case* reported where the question was squarely decided as to whether the Court could make an order under Section 15 of the Judiciary Act for the production of books and papers

for the inspection of the opposing party *before the trial*, and also as to what was necessary to justify the Court to make such an order. It was argued by very able and distinguished counsel on both sides. The defendants presented a *petition* to the Court on notice to the other side, for an order directing the plaintiffs to deposit certain papers, described in the petition, with the Clerk of the Court, for the inspection of the defendants and their counsel *before the trial*, so as to enable them to *"prepare for trial."*

The motion was strongly opposed, but the Court made the order prayed for, and pointed out very clearly and explicitly what must be shown to the Court *by the petition* to justify the order. It thus appears that the proper way to present to the Court the fact that the party called upon for the books has the books called for, and that they contain evidence pertinent to the issue, is by *petition* or *affidavit*, and not by oral evidence, as the petitioners' brief in the case at bar seems to claim.

FINCH *vs.* RIKEMAN, 2 Blatch., 301:

Action for damages for infringement of a patent. The plaintiff moved on an *affidavit* that defendants be ordered to produce their books of account, and that the plaintiff have leave to take copies of such parts thereof as referred to the matters set forth in the affidavit, and that on their failure to produce the books, etc., pursuant to the order, final judgment be rendered against them in the action. The defendant, *by affidavit*, denied the infringement and alleged that they kept no separate entry or account as to any particular job, but that all the accounts were in one book.

This motion was made before Judge BETTS, the same Judge who decided Jacques *vs.* Collins, *supra*. He denied the motion on the following grounds: (1) That Section 15 of the Judiciary Act only

gave power to the Court to direct the production of books and papers in cases and under circumstances in which a Court of Chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents (p. 302). (2) That the "effect of the evidence sought for will be not only to enable the plaintiff to recover his entire damages, but its direct consequences will be *to subject the defendants to a penalty* of three times the amount of those damages under Section 14 of the Act of July 4th, 1836, 5 U. S. Stat. at Large, 123," and that *therefore* a Court of equity would not allow a bill of discovery in such a case, "unless the bill relinquishes all claims to the penalty which may be superinduced by the production and exhibition of the books, and *for that cause* the motion must be denied" (p. 304).

Thus it will be seen that the Court did not deny the motion on the ground that it had no power to order a production of the books before the trial, but because the case made out by the affidavit of the moving party was not a "case and under circumstances in which a Court of Chancery by the ordinary rules of proceeding in that Court would compel the production of the books and documents."

Thus it appears that Judge BETTS in this case did not overrule his decision in Jacques *vs.* Collins, *supra.* He put his decision on the ground that the disclosure asked might subject the party moved against to *penalties and forfeitures,* and showed that a Court of Chancery would not compel a party to make such a disclosure by bill of discovery.

IASIGI *vs.* BROWN, 1 Curtis, 401:

There was a motion made in this case on an *affidavit,* to compel the production and delivery to the Clerk of the Court of certain papers alleged to be material on the trial of an action at law. The

existence of the papers and their materiality was not denied. The motion was resisted *"on the ground that the party moving had already filed a bill of discovery,"* covering substantially the same facts and documents; and "it was urged that having resorted to *this* mode of discovery, the party must read the answer, and could not have the benefit of the order under the Act of Congress."

Thus it will be seen that the question of the power of the Court to make an order for the discovery of the books and documents before the trial, *was not raised by counsel on either side,* and the lack of such power was *not urged* as a ground for the denial of the motion. The Court, however, on the hearing, made the following remark:

> "It (*i. e.*, the Act) does not enable parties to compel the production of papers before the trial, but only at the trial, by making such a case and obtaining such an order as the Act contemplates."

And the Court ordered the production of the papers at the trial, or that the parties show cause on the trial why the same were not produced.

The Court cited no cases in support of his dictum, and seems from the opinion not to have given the matter much consideration. He overruled the only point made by counsel in opposition to the motion, and held that the fact that the moving party had filed a bill of discovery was not a bar to making this motion, or to his getting the relief he sought.

MERCHANTS NATIONAL BANK *vs.* STATE NATIONAL BANK, 3 Clifford, 205:

In this case a motion was made by the plaintiff to compel the defendant to produce certain documents or writings in his possession. It does not appear whether the motion was to compel the pro-

duction of the books, etc., *before the trial* or *at the trial.* The motion was denied, but not on the ground that the Court had no power, but on the ground that the Court was not satisfied that a satisfactory case had been made out in the moving papers. The Court said that:

> "The evidence to show that the case is one within the conditions of the provisions is not entirely satisfactory. Were there no other objections to the granting of this motion, we should be constrained to deny it, but there is another even more decisive than those already suggested."

The Court then pointed out that it appeared that the books were in the custody of the bank officers, and would, no doubt, be produced under a *subpœna duces tecum,* but that if that failed to bring them, the Court would find some adequate remedy for the moving party.

In this case the Court does not express a positive opinion that it could not, in a proper case, and on a proper showing, order the production of the books before trial. It does not refer to the Iasigi case, or cite any authority. The Court said:

> "Production before trial is *perhaps* not contemplated by the words of the provision, nor is it generally necessary" (p. 204).

U. S. *vs.* YOUNG, 10 Benedict, 264. (Southern Dist. of N. Y., CHOATE, *J.*):

This was an action to recover a balance of duties on certain imported sugars. A motion was made by the defendant to compel the plaintiff to produce official returns of the weights of the sugars *before the trial.* The motion was made on *affidavits showing that the production and inspection was necessary to enable the defendants to prepare for trial.* Judge Choate granted the motion, and squarely held that the Court had power under Section 724

to order the production of papers for the inspection of the opposing party and their counsel *before the trial;* citing Central Bank *vs.* Tayloe, 2 Cranch, 427, *supra,* and Jacques *vs.* Collins, 2 Blatch., 23, *supra.* The Court also referred to the case of Iasigi *vs.* Brown, *supra,* showing that he had it before him when he made the decision.

UNITED STATES *vs.* HUTTON, 10 Benedict, 268.

(Decided in 1879, CHOATE, *J.*):

In this case too, Judge Choate, in the Southern District of New York, held that all books and writings might be ordered to be produced under Section 724 of the Revised Statutes before the trial, it being shown that they were pertinent to the issue. The Court said:

> "But this statute seems clearly to limit the remedy to cases where the *issue is joined,* one test of the statute to a right to a production of the books and papers being that they contain 'evidence pertinent to the issue'" (p. 278).

The Court then points out that the statute does not take away the right to relief by bill of discovery, and cites Beardsley *vs.* Littell, 14 Blatch., 405.

BEARDSLEY *vs.* LITTELL, 14 Blatch., 405:

In this case, Section 724, under consideration here, was not in question, and was not even mentioned or referred to. The motion was for an *examination of the defendants* before trial under Sections 390 and 391 of the New York Code of Procedure, and Section 914 of the United States Revised Statutes, and it was held that Section 914 did not make it possible to *examine a party* before trial in the United States Courts, and that such an examination was forbidden by Section 861 of the Revised Statutes.

COLGATE *vs.* COMPAGNIE FRANCAISE, 23 Fed. Rep., 82:

No motion was made in that case for a production of the books and papers *before* or *at* the trial. A bill of discovery was filed on the equity side of the Court, and the case came up on a demurrer to the bill; one of the grounds of the demurrer being that the Court should refuse to entertain the bill because under Sections 724 and 858 of the Revised Statutes, and the existing practice in courts of law, discovery no longer was necessary, but that the plaintiff could obtain in a suit at law all necessary evidence by an examination of the officers of the defendant, and by obtaining an inspection of the books and writings containing pertinent evidence. The Court overruled the demurrer, *but did not in any way pass upon the question at issue here,* or upon the construction and application of Section 724 of the Revised Statutes. The question as to whether the books and papers could be ordered to be produced before trial or at the trial was *not raised or considered* in the case. All the Court did say was that by Sections 724, 858 and 914 of the Revised Statutes, a party could not

> "obtain the *testimony of the defendant* before the trial in an action pending in this court, although he could do so in the state courts, because Section 861 of the Revised Statutes, as construed in Beardsley *vs.* Littell, 14 Blatch., 102, requires *such testimony,* unless taken *de bene esse* or by commission, to be taken in the presence of the court and jury at the trial" (p. 83).

There was no question of books and papers in that case. It was a question of obtaining the *testimony of the opposite party* by answers to the bill of discovery.

GUYOT *vs.* HILTON, 32 Fed. Rep., 743:

In that case there was an application under Section 724 for the production of books for inspection before trial. It was denied on the ground that the proper practice to obtain such relief in that circuit was by bill of discovery. Subsequent decisions, both in the Supreme Court and in the Circuit Court, seem to have held otherwise. In *ex parte* Boyd, 105 U. S., 647, the Court said:

> "A bill in equity to compel disclosures from a plaintiff or defendant, of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in the pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer, under oath, all relevant interrogatories properly exhibited; nor to compel the production of books, deeds or other documents, important as instruments of evidence, *when the court of law in which the* suit is pending *is authorized by summary proceedings* to enforce the *same right.*"

And this seems to have been the view of the same Court in Union Pacific Ry. Co. *vs.* Botsford, 141 U. S., 250.

It was said by the Circuit Court of Appeals in the Fourth Circuit in the Case of Safford *vs.* Ensign Mfg. Co., 120 Fed. Rep., 480, 482:

> "It has been held that in ordinary cases a pure bill of discovery can no longer be maintained in the equity courts of the United States because under Section 724 of the Revst. Statutes it is *no longer generally needed.*"

It was said by Justice BREWER, in Preston *vs.* Smith, 26 Fed. Rep., 884, 889:

> "Finally it is claimed that the bill must be sustained because a discovery is sought. I

> do not understand that a bill can be sustained solely for the purpose of discovery; at least, that is the general rule. Indeed, bills of discovery are *rarely, of late, resorted to.* They have fallen (if I may be permitted to borrow a phrase from the political parlance of the day) into a condition of 'innocuous desuetude.'"

And in Brown *vs.* McDonald, 133 Fed. Rep., 897, it was held by the Circuit Court of Appeals in the Third Circuit, that Sections 724 and 885 of the Revised Statutes

> "have removed *the necessity* of resorting to bills of discovery in ordinary cases, but we are not willing to hold that the statutes have altogether abolished the equitable remedy by bill of discovery."

So that the ground on which Judge LACOMBE, in Guyot *vs.* Hilton, *supra,* denied the motion, has since been decided not to be tenable.

BLOEDE *vs.* BANCROFT, 98 Fed. Rep., 175:

This is the most carefully considered case in the books, on the *exact question here at issue.* It came up in the Circuit Court in the District of Delaware, Judge BRADFORD writing the opinion. That opinion is exhaustive. It goes into the whole history of this section, and considers all of the cases referred to by the petitioners here, and many others, and shows that both on principle and authority the power of the Court here contended for by the respondent and exercised by the Court below exists under Section 724 of the Revised Statutes. We cannot present the question any more clearly than it is presented by Judge BRADFORD in that case. In the course of his opinion, he says:

> "It is, and was, at and prior to the passage of the Judiciary Act, within the settled jurisdiction of chancery, and a usual practice, to

> order production before trial of an action at law of documents containing pertinent evidence for inspection by a party having the requisite interest therein, and desiring to use the same in *preparing himself for trial.* It must be assumed that Congress was aware that the 'circumstances' under which production might be compelled in chancery, embraced cases where the purpose of the party applying was to inspect, examine and take copies of the books or writings *before the trial* of an action at law in order to prepare for such trial. It is reasonable, then, to conclude that the statute authorizes the courts in actions at law to order production for inspection *after issue joined,* in all cases and under all circumstances where it might have been ordered in chancery, in aid of parties to such action, and that this court, sitting as a court of law, can in such actions under pain of nonsuit or default, enforce production of books or writings to the same extent, and for the same purposes as when sitting as a court of equity and compelling production in aid of such action" (p. 184).

The Court then goes on to show that the construction of the section that books and writings could only be produced at the trial would

> "be inconvenient, dilatory and expensive, with nothing to justify it, leading to postponements to allow time for inspection, and calculated to embarrass and defeat the due administration of justice" (p. 185).

GRAY *vs.* SCHNEIDER, 119 Fed. Rep., 474:

There was just such a motion as the one made in the case at bar made in that case before Judge LACOMBE, in the Southern District of New York, and the motion was granted on the authority of the Bloede case, *supra.*

UNITED STATES *vs.* NATIONAL LEAD CO., 75 Fed. Rep., 94:

This was a case in the Circuit Court for the District of New Jersey, and the motion for the discovery was made under a section of the State statute as well as under Section 724 of the Revised Statutes. The learned Judge who decided it seems to have misunderstood the words of the section, using, both in the quotation of the section and in his opinion elsewhere, the words "on the trial of actions at law," instead of "in the trial of actions at law," and seems to have laid a good deal of weight upon the words "on the trial." He denied the motion, but not solely, and not apparently principally, upon the ground of want of power of the Court to make the order asked for. The other, and seemingly principal, ground for denying the motion, was that

> "the discovery sought may indeed have no immediate tendency to incriminate the defendant, but that does not militate against the force of the rule that the defendant is not bound to accuse himself of a crime, or to furnish any evidence whatever which shall lead to any accusation of that nature" (p. 97).

The motion was denied, therefore, apparently principally on the ground that it would tend to convict the party of a crime.

KIRKPATRICK *vs.* POPE, 61 Fed., 46:

This case came up in the Circuit Court for the District of Connecticut. A motion was made to compel the defendant to produce its books and records *at the trial of the action*, and *not* before the trial, and the motion was granted. The case does not pretend to decide, or even to consider, whether the Court had the right to order the production of

books and papers *before the trial,* and the case, in no view, is any authority upon that question.

CASSATT *vs.* MITCHEL COAL & COKE CO., 150 Fed. Rep., 32:

This is the only case considered by a Circuit Court of Appeals, referred to in the petitioners' brief, where it has been held that Section 724 of the Revised Statutes did not confer power on the Court to require a party to produce books before trial; and in this case BUFFINGTON, Circuit Judge, dissented.

The action was brought by the Mitchel Coal & Coke Co. against the Pennsylvania R. R. Co., a corporation, to recover damages for its alleged violations of Sections 2 and 3 of the Interstate Commerce Act. The defendant filed a plea of not guilty; and, after issue was joined, and before the trial of the action, the plaintiff filed in the Circuit Court a petition, setting forth that the defendant and Alexander J. Cassatt, President, and John B. Thayer, one of the Vice-Presidents, and ten other specifically named officers and employees of the defendant, had in their possession and power certain books and papers containing evidence pertinent to the issue, and asking for an order requiring the defendant and said officers and employees to produce the said books and papers at the trial, "and also for the inspection of the plaintiff's representatives before trial," under Section 724.

The Circuit Court, after granting an order to show cause, ordered that Cassatt, Thayer and the other officers and employees of the defendant produce on the trial the papers described in the petition, and also that they produce them *before trial* at a specified time and place, for the inspection of the plaintiff, with leave to make copies thereof. Thereupon a writ of error was sued out by the *individual defendants only,* to review that order.

The bulk of the opinion of the Circuit Court of Appeals is taken up with a consideration of the question as to whether that order was "a final decision"; or, in other words, a final decree or final judgment, so that the individual defendants might review it by a writ of error in the Circuit Court of Appeals; and it was held that it was such a final decision, and was reviewable by writ of error.

The Court also was of the opinion that under Section 724 of the Revised Statutes, the Circuit Court had no power to order the production of the books for inspection before the trial. It is to be observed that in this case no order was made directing the "party" defendant in this action (*i. e.*, the Pennsylvania R. R. Co.) to produce any books.

At the same time that the order was made in this action, there seems to have been a like order made in two other actions against the same defendant, the one brought by the Pennsylvania Coal & Coke Co., and the other by the Webster Coal & Coke Co., in which the parties were represented by the same counsel on each side; and that writs of error were sued out by the same individuals to review both of those orders in the Circuit Court of Appeals, at the same term; and in both of which cases a like decision was made by the Circuit Court of Appeals (150 Fed. Rep., 48), without separate opinions, but upon the opinion in the case of Cassatt *vs.* The Mitchel Coal & Coke Co., *supra.*

A writ of *certiorari* was granted by the United States Supreme Court to review the orders in the two latter cases, and on that review the judgments of the Circuit Court of Appeals in the Third Circuit were reversed by this Court, upon the ground that the individual defendants against whom the order was made were not "parties" to the actions, and that the order against them was purely interlocutory, and not a final decision which could be reviewed by the Circuit Court of Appeals on a

writ of error (207 U. S., 181-187). So that it was there determined by this Court, that the Circuit Court of Appeals had no jurisdiction to review the orders in any of those cases; and, therefore, whatever the opinion of the Circuit Court of Appeals in any of those cases contained as to the *power* of the Court to order production of books and papers before the trial, under Section 724, was not an authoritative decision of the question, and was nothing more than an expression of opinion in a case not properly before it, and upon which it had no jurisdiction to pass.

That leaves the decision of the Circuit Court of Appeals in the Second Circuit in the case at bar as the *only decision of a Circuit Court of Appeals upon the subject here at issue.* But if the Circuit Court of Appeals in the Third Circuit had had the right to review the orders in those cases, its reasoning in its opinion on this subject was, we think, unsound. The learned Judge who wrote the opinion refers on page 42 to the case of Bloede *vs.* Bancroft, 98 Fed. Rep., 175, *supra,* but does not answer the reasoning of the learned Judge who wrote the opinion in that case. The Court in the Cassatt case (p. 42), referring to the opinion in the Bloede case, said:

> "In the opinion of the learned Judge who decided that case, there is no reference to Bas *vs.* Steele or Dunham *vs.* Riley."

These cases we have referred to above, the former being found in 3 Wash. C. C., 381, and the latter in 4 Wash. C. C., 124; and we have shown above that in neither of these cases did the question of the right of the Court to order the production of books and papers *before trial* come up for adjudication, and in neither of the cases was the question considered or decided.

The learned Judge in his opinion in the case of Cassatt *vs.* Mitchel Coal & Coke Co., *supra,* said (p. 39), that in chancery under a bill of discovery, the Court might order documents in the possession of one of the parties to be produced "on final hearing, or before the examiner who takes the evidence for final hearing, or even *at any time after filing of an answer.*"

The Court cites no case in support of its opinion on this point (except the case of Iasigi *vs.* Brown, 1 Curtis, 401, *supra*), in which it has been decided that the United States Courts have no power under Section 15 of the Judiciary Act, or Section 724 of the Revised Statutes, to order the production of books before trial, in which the question was really before the Court to be decided. And as we have shown above, in the case of Iasigi *vs.* Brown the motion was not resisted on the ground that the Court had no such power, but upon the ground that the applicant had already filed a bill of discovery to obtain the same relief.

We submit that the reasoning of the Court in that case is unsound, and that it does not answer the reasoning of the Court in Bloede *vs.* Bancroft, *supra,* and that it is contrary to the vast weight of authority in the Circuit Courts in other cases, as we have shown.

We beg to call the Court's attention also to the following cases in the United States Circuit Courts not cited by the petitoners in their brief, in which it has been held that the Circuit Courts had power, under Section 724, to order the production of books and papers before the trial.

CAMERON LUMBER CO. *vs.* DRONEY, 132 Fed. Rep., 304.

(Southern Dist. of N. Y.)

LUCKER *vs.* PHOENIX ASSURANCE CO. OF LONDON, 67 Fed. Rep., 18.

(Dist. of South Carolina.)

In this case the Court said:

> "It seems, however, to be a narrow construction of Section 724 to limit its operation to the actual trial. Its purpose, clearly, is to provide a substitute for a bill of discovery and to secure at law the purposes which such a bill would subserve. All the cases seem to recognize this. On a bill of discovery, necessarily the facts sought would be discovered before trial. Besides this the section says that this order for the production of papers can be made 'in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.' The proceeding in chancery required the deposit of the papers called for with the clerk, who, upon notice, produced them in court before the examiner (2 Daniell's Ch. Prac., 1388, 1389)."

EXCHANGE BANK *vs.* WASHINGTON CATTLE CO., 61 Fed. Rep., 190.

(Eastern Dist. of Missouri.)

GREGORY *vs.* CHICAGO, MILWAUKEE & ST. PAUL R. R. Co., 10 Fed. Rep., 529.

(Dist. of Iowa.)

In this case the Court points out that inasmuch as the making of the order lies in the discretion of the Court, it can always provide against oppression by not requiring the books of a party to be produced at a great distance from where they are kept, and in case their production would cause a too serious inconvenience to the party whose books were called for, and this answers the argument of the petitioners here on page 25 of their brief.

NEWCOMB *vs.* BURBANK, 159 Fed. Rep., 568.
(Southern Dist. of New York.)

SCHAEFER *vs.* INTERNATIONAL POWER CO., 157 Fed., 896.

Since the decision of the Circuit Court of Appeals, in the Second Circuit, in the case at bar, and since the granting of the writ of certiorari to the Supreme Court in this case, a well-considered decision on the subject has been made by the Circuit Court in the Western District of Missouri, District Judge Van Valkenburgh writing the opinion.

In this opinion the learned Court goes over all the cases above mentioned and some others, and shows clearly that the intention of Section 724 was to permit a discovery of books and papers in the possession of the other side before the trial. (See Rosenberger *vs.* Shubert, 182 Fed. Rep., 411).

In that particular case the Court, while maintaining the proposition that the Court had the power and authority to order a discovery and inspection of the papers of the other side before the trial, denied the application as a matter of discretion in that particular case, and principally on the ground that it did not appear that the party from whom discovery was sought had in its possession or power the books and writings of which discovery was asked.

The Court said:

> "From what is before it the Court cannot say with sufficient certainty at this stage of the proceeding whether the possession and power of these defendants over the writings demanded are sufficient to support a summary rule to produce before trial under pain of the severe penalties provided in this section" (p. 20).

In the case at bar, the Circuit Court, as we already said, has passed upon this matter as a matter of discretion, and that discretion has been affirmed by the Circuit Court of Appeals and will not be reviewed here.

We submit, therefore: (1) That the vast weight of authority in the United States Courts is in favor of the power of the Court to make the orders complained of. (2) That the Courts of most of the States and the English Courts, have the same power by statute. (3) That the power of the Court to make such orders is in furtherance of justice, and the speedy administration thereof, and in accordance with general usage. (4) That sound reasoning and a fair construction of the statute upholds the power of the Court to make the orders complained of.

And on this last consideration, the case of People *ex rel.* Wood *vs.* Lacombe, 99 N. Y., 45, is instructive. In that case the Court of Appeals of the State of New York said:

> "It is the spirit and purpose of the statute which are to be regarded in its interpretation; and if these find fair expression in the statute, it should be construed so as to carry out the legislative intent, even though such construction is contrary to the literal meaning of some of the provisions of the statute. A reasonable construction should be adopted where there is a doubt or certainty as to the intention of the lawmakers."

II.

Section 724 of the Revised Statutes, under which the orders complained of were made, deals with a question of practice and not of substantive law.

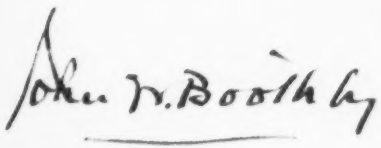
Judge LACOMBE, in Schaeffer *vs.* International Power Co., 157 Fed., 896, on a like motion, said:

> "This is a question of practice not of substantial law; and the practice which was settled for this Circuit in Gray *v.* Schneider (C. C.), 119 Fed., 474, and Cameron Lumber Co. *vs.* Droney (C. C.), 132 Fed., 304, should not be abandoned because of the decision in the Third Circuit in Cassatt *vs.* Mitchell Coal & Coke Company, 150 Fed., 32, 81 C. C. A., 80, especially so, as inspection is granted in proper cases, in a majority of the other Circuits."

III.

The writ should be dismissed, and the order of the Circuit Court of Appeals found on page 35 of the Record affirmed.

JOHN W. BOOTHBY,
ERNEST E. BALDWIN,
Counsel for Respondents.



Under § 724, Rev. Stat., a court of law cannot compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection of the other party.
165 Fed. Rep. 636, reversed.

IN an action wherein David J. Winn was plaintiff and Joseph N. Carpenter, and others, defendants, the plaintiff Winn obtained an order from the court requiring the defendants to produce certain books and papers said to contain evidence material to make out the plaintiff's case. The order required the defendants to produce "all of their books, papers, writings, account books, day books, blotters, journals, registers, cash books, check books, contracts, contract slips and memoranda, made or received by them, their agents and employés, which contain any memoranda of any business transactions," relating to the plaintiff during the years 1905 and 1906, and particularly pertaining to a certain brokerage transaction in cotton. The order required such production before the trial, and that the plaintiff and his attorneys should be allowed, at the office of the defendants, within a time named, access to such books and papers, with leave to "examine and investigate the same and to make copies and extracts from such books, documents and writings." The order concluded thus: "In the event the defendants fail to comply with this order, judgment against them shall be entered by default."

The defendants conceiving that the court had no authority to require the production of their business books and correspondence before the trial of the cause for the investigation of the plaintiff, declined to obey the order. Thereupon judgment by default was entered and a jury empanelled to assess the plaintiff's damages, which being done, there was judgment for the plaintiff for the amount so assessed. This judgment was affirmed by the Circuit Court of Appeals and the case has come here upon a writ of certiorari.

Mr. John R. Abney for petitioners:

The decision of the court below in the case at bar is in direct conflict with the prior decisions of the Circuit Courts of Appeals for the Third and other Circuits construing said section, and is also in direct conflict with the plain language of the statute. See 1 Annals of Cong. 1846, 48, 49, 80, 74, 659, 903; Journal of Maclay, 74, 85, 117, 150; 1 Annals of Cong. 782–894; *Geyger's Lessee* v. *Geyger*, 2 Dallas, 332; Carson's Hist. of Supreme Ct. 184; *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Bas* v. *Steele*, 3 Wash. C. C. 381; *Dunham* v. *Riley*, 4 Wash. C. C. 126; *Central Bank* v. *Tayloe*, 2 Cranch C. C. 427; *Triplett* v. *Bank*, 3 Cranch C. C. 646; *Waller* v. *Stewart*, 4 Cranch C. C. 532.

It appears that it became the practice to order the books produced at the trial. Judge Betts of New York, sitting in the Circuit Court, held that the plaintiff could be required to show his papers to the defendant before the trial. He so decided under the influence of the rule which permitted it in the state courts of New York. *Jacques* v. *Collins*, 2 Blatch. C. C. 23. But see *Finch* v. *Rikeman*, 2 Blatch. 301; *Iasigi* v. *Brown*, 1 Curtis, 401; *Merchants' Nat. Bk.* v. *State Bk.*, 3 Cliff. 201.

In 1879, it was held that inspection of books could be had before the trial, under the influence of the state practice. *United States* v. *Youngs*, 10 Ben. 264; *United States* v. *Hutton*, 10 Ben. 268; but in 1885, it was held, citing *Beardsley* v. *Littel*, 14 Blatch. 102, that § 724 did not permit an examination of a party's books before trial. *Colgate* v. *Compagnie Francaise*, 23 Fed. Rep. 82; and see also *Guyot* v. *Hilton*, 32 Fed. Rep. 743. Thus the question seemed settled in the Southern District of New York that an inspection of books was not authorized under § 724 before the trial.

But in 1899 an inspection of books and papers before trial was allowed by the District Judge in Delaware.

Bloede v. *Bancroft*, 98 Fed. Rep. 175, and followed by Mr. Justice Lacombe in *Gray* v. *Schneider*, 119 Fed. Rep. 474.

For other cases on this point, see *United States* v. *Nat. Lead Co.*, 75 Fed. Rep. 94, 95; *Kirkpatrick* v. *Pope*, 61 Fed. Rep. 46, 47, 49; and the Circuit Court of Appeals held that § 724 does not confer the power to require a party to produce books before trial in *Cassatt* v. *Mitchell C. & C. Co.*, 150 Fed. Rep. 32, 44; and see *Penna. R. R. Co.* v. *Int. C. M. Co.*, 156 Fed. Rep. 765.

Only in connection with the other testimony in a case can the court know what right the applicant has to see books and papers and the relevancy. There is no fairness vouchsafed in a hearing of these questions on affidavits. There is no chance to see and cross-examine the affiants, and it gives an undue advantage to those who are willing to swear anything when there is no cross-examination.

From discretionary interlocutory orders in the Federal courts there is no appeal except as to injunctions and reviews. 26 Stats. 828, §§ 6, 7. In a state court there would be.

The fact that the statute provides that the party failing to show books shall suffer "nonsuit" or "default," as the case may be, shows that it was to be at the trial.

The construction placed upon § 724 by the court below would make it possible in a case pending in New York to require a party living in California to produce his books in New York before the trial, and also at the trial.

The act should be construed under the lights then existing.

The petitioners have a right to keep their books and papers a secret under the common law and the Constitution, and § 724 should be construed strictly, like an attachment statute. *Entrich* v. *Carrington*, 19 Howell St. Tr. 1029; *Boyd* v. *United States*, 116 U. S. 616, 626, 627.

Congress having provided for discovery, there is no other authority. The statute of New York and the practice in that State cannot affect the question. *Ex parte Fisk*, 113 U. S. 713; *Amy* v. *Watertown*, 130 U. S. 301; *Pierce* v. *Un. Pac. R. Co.*, 47 Fed. Rep. 709.

Mr. John W. Boothby, with whom *Mr. Ernest E. Baldwin* was on the brief, for respondent.

Mr. Justice Lurton, after making the foregoing statement of the case, delivered the opinion of the court.

The question is whether under § 724 of the Revised Statutes, a court of law may compel one party to an action to produce, in advance of the trial, books and papers for examination and inspection of his adversary.

Section 724 is substantially the fifteenth section of the Judiciary Act of 1789. It reads as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant, as in cases of nonsuit: and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

The purpose of the provision is to provide a substitute for a bill of discovery in aid of a legal action. It may be invoked only when the document sought "contains evidence pertinent to the issue," and "in cases and under circumstances when they might be compelled to produce the same by the ordinary rules of proceeding in chancery." The penalty for failing to comply with such an order is

exceedingly stringent, that of a nonsuit or a judgment by default.

For more than a century trial courts have disagreed as to whether under this enactment the procedure is limited to a requirement that the books, documents and writings be produced at the trial, or, in the discretion of the court, before the trial, for such investigation and examination as the party obtaining the order might desire.

The contention upon the one side is that "in the trial" does not mean "at the trial," or, "during the trial," but at any time after issue joined.

The doubt about the meaning of the provision is engendered by the use of the words "in the trial." It is, of course, urged that if the Congress had intended to limit the right to such production, it would have said "at the trial," or "on the trial." But it is said with equal force that if the purpose was to compel such production before the trial and after issue joined, Congress would have substituted the words, "in an action at law," instead of using words seemingly more restrictive.

But taking the words as written, what must we infer Congress to have meant by empowering the court to compel production "in the trial"?

Some of the considerations which collectively lead us to conclude that the words "in the trial" mean "on or at the trial" are these:

a. The significance of the word "trial." Does that word embrace anything more than is commonly understood when we speak of the "trial" of an action at law? Or does it include, as contended here, every step in a cause between issue joined and that judicial examination and decision of the issues in an action at law, which we always refer to as the trial?

Blackstone defines "trial" to be the examination of the matters of fact in issue. 3 Bl. Com. 350. This definition is adopted by Bouvier. In *Miller* v. *Tobin*, 18 Fed. Rep.

609, 616, Judge Deady applied this meaning to the removal act, saying, "Trial is a common-law term, and is commonly used to denote that step in an action by which issues or questions of fact are decided." But the word has often a broader significance, as referring to that final examination and decision of matter of law as well as fact, for which every antecedent step is a preparation, which we commonly denominate "the trial." Many cases are cited for this definition in 28 Am. & Eng. Ency., p. 636. But this does not help out those who would broaden the meaning so as to justify an order to produce before such judicial examination of both matters of fact and law which constitute that final step which is called "the trial."

b. "In the trial" implies a restricted use of the procedure as compared to a bill of discovery.

Under the ordinary rules of procedure in chancery to obtain a discovery of evidence material to the maintenance or defense of an action at law, such evidence must, in the very nature of things, result in production before the "trial" at law. Such procedure is still open if it is desired to have the evidence produced before the trial. A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances. See the very instructive discussion of the question by Judge Wallace in *Colgate* v. *Compagnie Francaise &c.*, 23 Fed. Rep. 82.

In *Guyot* v. *Hilton*, 32 Fed. Rep. 743, an application under § 724 to require the plaintiff to produce for the inspection of the defendants the business books of the plaintiff's firm for certain years "in order to enable them to prepare for trial," was denied, Judge Lacombe saying that the proper practice to obtain such relief was by a bill in equity for discovery.

The statute may therefore be well regarded as affording

a short and quick way of obtaining documentary evidence for use "in the trial" of an action at law, leaving the parties to a bill of discovery if they desire the production before the trial for the purpose of preparing for it.

c. Another consideration leading to the same conclusion is found in the fact that a bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a "fishing bill," and will be dismissed. Story, Eq. Pl., §§ 320 to 325. Such a bill must seek only evidence which is material to the support of the complainant's own case, and prying into the nature of his adversary's case will not be tolerated. The principle is stated by a great authority upon equity thus: "Nor has a party a right to any discovery except of fact and deeds and writings necessary to his own title under which he claims; for he is not at liberty to pry into the title of the adverse party." Story, Eq. Juris., § 1490; *Kettlewell* v. *Barstow*, 7 Ch. App. Cas. 686, 694. In *Ingilby* v. *Shafto*, 33 Beav. 31, it was said:

"The province of discovery in equity is not to compel a defendant, who is a plaintiff in a suit at law, to disclose in what manner he intends to make out his case at law. The plaintiff in equity is entitled only to the discovery of such matters in the knowledge, or possession, of the defendant in equity, as will enable him to make out his own case at law; and exceptions to an answer, omitting to respond to inquiries touching the mode in which the defendant purposed to make out his case at law, and as to documents 'relating to matters in the bill mentioned,' were overruled."

This "fundamental rule," as it is called by Judge Story in his work upon Equity Pleading, § 317, in view of the express limitation of the section, "to cases and under circumstances" when discovery might be obtained in equity,

implies that production of an adversary's documents should not be required before trial, that one party may examine and inspect in search of evidence which he may or may not use in the trial.

d. Another consideration arises from the very stringent penalty which is to result if the judge shall conclude that the documents desired have not been produced. The party against whom such an order is sought has the undoubted right to make every objection which he could make were he a defendant in equity to a bill seeking discovery of the same evidence, for the right to compel production is no broader under the statute than under a discovery proceeding in equity. This would include the right to insist that the case, the circumstances and the purpose to be advanced were not such as to justify the order. He must also be heard, if he desires, upon the pertinency of the evidence which is being sought and the right to insist that he be not required to disclose that which pertains only to his side of the case, but only that which is material to make out the case of the party seeking the order.

When, where and how are these important questions to be heard and decided? If heard by the court in advance of the trial, it will often be necessary that it shall possess itself of that kind of knowledge of the case which can be had only on the trial where the evidence is to be produced. This in many cases will practically require two trials, one before the jury is empanelled, another after. Opportunities for a miscarriage of justice, as well as inconvenience to the trial judge, may be reduced to a minimum by making an order to produce at the trial, or there show cause why he should not. *Bas* v. *Steele*, 3 Wash. C. C. 381; *Dunham* v. *Riley*, 4 Wash. C. C. 126.

In *Bas* v. *Steele* the order was to produce at the trial. Nothing is said in the opinion of Mr. Justice Washington about production before the trial, but the construction of

the act by the learned Justice furnishes practical reason for construing the statute as we have indicated. Construing the section he said:

"It is not difficult to give a construction to the section of the act of Congress. When either party wants papers, he must give notice; and he has in view one of these objects: 1st. That if the papers called for are not produced, he may be enabled to argue against the party not producing them to the jury; 2d. This object may be to obtain evidence from the contents of the papers called for; and, 3d. To move the court for a nonsuit, or for a judgment by default, as the case may be. But in either case, the party must entitle himself to the benefits of the section, by showing that the party was in possession of the papers called for; and he must also give evidence of the contents of the papers; for it will not do for him only to say what those contents are. The court will require reasonable proof of the possession, and of the pertinency of the papers. If the object of the party is to avail himself of the provision of the section, so as to move for a nonsuit, or for judgment by default, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice, will come prepared to meet it. In any such case, when the party is called on to produce papers, he may make oath that he has them not; and thus extricate himself from difficulty. This is the case in chancery, where the plaintiff charges the defendant with having papers to which he has a right, and the defendant relieves himself by his oath; and this may be met by contrary proof of two witnesses. In every case, the party claiming the papers must give evidence of the relevancy of the papers, and of the opposite party having possession of them. Whenever a judgment by default, or nonsuit, is intended to be claimed, the notice to produce papers, must give the party information that it is intended to move for a nonsuit, or a judgment by default, as the case may be;

and this must hereafter be considered as the rule of the court, under this section of the act of Congress."

In *Dunham* v. *Riley* the order was to produce on the trial. Reasons for making the rule *nisi* instead of absolute are given by Mr. Justice Washington, who said:

"But the court [in *Bas* v. *Steele*] did not decide whether such order must be absolute in the first instance. We think it need not be so; but that upon the rule to show cause, it may be made *nisi;* leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them. If the rule be made absolute at the time when it is argued, the court might have to go prematurely into an inquiry into the case, in order to decide whether the order should be absolute or not."

The statute has never been construed by this court, and the practice and decisions of the inferior courts have no such uniformity as to exert any controlling influence. There are perhaps as many cases upon one side as upon the other. We shall therefore refer to but a few of them.

The Third Circuit Court of Appeals construes the statute as requiring production only on the trial. *Cassett* v. *Mitchell,* 150 Fed. Rep. 32, 44; *Penna. R. R. Co.* v. *International Coal Co.,* 156 Fed. Rep. 765, 769.

The Circuit Court of Appeals for the Second Circuit reached an opposite conclusion in the case now before us.

Since *Jacques* v. *Collins,* 2 Blatch. C. C. 23, decided in 1845, the United States courts for the New York districts have generally followed the broad interpretation of Judge Betts, an interpretation which was plainly influenced by the practice in the courts of the State of New York under a state statute dealing with the matter. It is significant that in *Jacques* v. *Collins* there was no opposition to the rule to produce before trial and no consideration given to the practice under the statute in courts of the United States.

CARPENTER *v.* WINN.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 135. Argued April 20, 21, 1911.—Decided May 29, 1911.

Section 724, Rev. Stat., has never been construed by this court, and the decisions of the inferior courts have not had such uniformity as to exert any controlling influence.

The word "trial" as used in § 724, Rev. Stat., refers to the final examination and decision of matter of law as well as facts, for which every antecedent step is a preparation.

A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained, because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances.

In *Bloede* v. *Bancroft*, 98 Fed. Rep. 175, though since overruled by the Circuit Court of Appeals for the Third Circuit, there is to be found a review of most of the cases bearing upon the subject.

The conclusion which we reach as to the meaning of the statute finds support in many reported cases, which, although no more numerous than those upon the other side, are entitled, as we conceive, to the greater weight as precedents. The very early practice under what was then known as the fifteenth section of the Judiciary Act of 1789, as shown by *Geyger's Lessee* v. *Geyger*, 2 Dallas, 332; *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Triplett* v. *Bank*, 3 Cranch C. C. 646, and *Dunham* v. *Riley*, 4 Wash. C. C. 126, was to direct the production of books and documents at the trial. The very first reported opinion under the section, the *Geyger Case* cited above, was by Mr. Justice Patterson, one of the sub-committee of the Judiciary Committee of the Senate which framed the act. The order in that case was one requiring production on the trial of the action. *Hylton* v. *Brown*, 1 Wash. C. C. 298; *Bas* v. *Steele*, 3 Wash. C. C. 381, and *Dunham* v. *Riley*, 4 Wash. C. C. 126, were cases in which Mr. Justice Washington presided. Some of the observations of the Justice in *Bas* v. *Steele* and *Dunham* v. *Riley* have already found a place in this opinion. Two other of the early practice cases worthy of notice are *Triplett* v. *Bank*, 3 Cranch C. C. 646, and *Wallar* v. *Stewart*, 4 Cranch C. C. 532.

In 1853 the interpretation of this section of the Judiciary Act came before Mr. Justice Curtis, and his view of the question is found in *Iasigi* v. *Brown*, 1 Curtis C. C. 401. There was a motion, based upon affidavits, to compel the production and delivery to the clerk of the court of certain documents alleged to contain evidence material to the issues in a pending action. The opinion was upon this motion. The Justice said:

"By the common law, a notice to produce a paper,

merely enables a party to give parole evidence of its contents, if it be not produced. Its non-production has no other legal consequence. This act of Congress has attached to the non-production of a paper, ordered to be produced at the trial, the penalty of a nonsuit or default. This is the whole extent of the law. It does not enable parties to compel the production of papers before trial, but only at the trial, by making such a case, and obtaining such an order as the act contemplates. The applicant must show that the paper exists, and is in the control of the other party; that it is pertinent to the issue, and that the case is such that a court of equity would compel its discovery.

"The application for such an order may be made, on notice, before trial. There is a manifest convenience in allowing this. But, at the same time, I think the court should not decide finally on the materiality of the paper, except during the trial; because it would occupy time unnecessarily, and it might be very difficult to decide beforehand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a court of equity would compel its production. These points could ordinarily be decided without difficulty during a trial, after the nature of the case, and the posture and bearings of the evidence are seen.

"If the notice is made before the trial, the correct practice seems to me to be, after the moving party has made a *prima facie* case, to enter an order *nisi*, leaving it for the other party to show cause at the trial. He must then come prepared to produce the paper, if he fails to show cause."

In *Merchants' National Bank* v. *State Bank*, 3 Clifford, 201, Mr. Justice Clifford summarized procedure under the section. Among other things he said (p. 203):

"Those conditions are that the motion must be in a case at law, and on due notice to the opposite party, and it

must appear that the books or writings are in the possession or power of the other party, and that they contain evidence pertinent to the issue, and that the case and circumstances are such that the party might be compelled to produce the same, as therein provided. No doubt is entertained that the motion may be made, in a pending action at law, before the day of the trial; but the requirement of the order of the court must perhaps be that the books and writings be produced at the trial of the action. Such an order may be absolute or *nisi*, as the circumstances may justify or require. Production before the trial is not perhaps contemplated by the words of the provision, nor is it in general necessary, as the penalty, in case of failure to comply with the order, is not arrest and imprisonment until the party comply, as for a contempt, but a judgment of nonsuit or default, as the plaintiff or defendant is the offending party. Where the motion is accompanied by satisfactory proof that the case is one in all respects within the conditions of the provision, and it is also satisfactorily shown that there is just ground to apprehend that the books and writings may be destroyed or transferred to another, or removed out of the jurisdiction before the day of the trial, the order should be made without delay, and be absolute."

For the reasons we have stated, and upon the authorities we have cited, the judgments of both courts must be reversed.

MR. JUSTICE HUGHES dissents.